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A
FULL, CLEAR, AND FAMILIAR *10 Kc*
EXPLANATION⁹
OF THE
L A W
CONCERNING
BILLS OF EXCHANGE,
PROMISSORY NOTES,
AND
THE EVIDENCE
ON
A TRIAL BY JURY RELATIVE THERETO;
WITH
A DESCRIPTION
OF BANK NOTES,
AND
THE PRIVILEGE OF ATTORNIES.

By PETER LOVELASS, of the Inner Temple, Gent. Author *K.*
of the LAW'S DISPOSAL.

L O N D O N:

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EXPLANATION

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T H E C O N T E N T S.

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A FAMILIAR

T H E
P R E F A C E.

THE many millions of property daily circulating in bills of exchange and promissory notes, wherein every man in any way of business or calling must almost inevitably be concerned; as hereon the support and exercise of trade and commerce, both at home and abroad, is continually depending; and the numerous suits commenced and prosecuted in the courts of law even within those last twenty years, for determining the properties, nature, and effects, of paper credit, are indisputably loud calls for a work of this kind: and, as a deficiency in the knowledge of this branch of jurisprudence has proved not only injurious, but fatal to many: the utmost care is here taken to elucidate the law relative hereto, and render the same clear and comprehensive.

AND with a due sense of the important subjects contained in those sheets, great care has been taken in thoroughly digesting, and properly authenticating the same, with references to the best and most recent authorities; the like precaution being here taken which the author took in compiling his work, entitled,
“ The

“ The Law’s Disposal,” particularly the fifth edition thereof, wherein he endeavoured to lay down the law with more clearness and perspicuity than in his former editions, and to render the same perfectly comprehensible to persons who might have but little or no previous knowledge of law books; and similar to his proceeding therewith, and shewing in a plain, clear, and familiar manner, who would be entitled to an intestate’s estate and effects, by the laws of England, and some prevalent customs; and the sure and safe methods to be pursued by testators in forming and executors performing their wills; with a variety of forms for enabling every man accurately to make and alter his own will; and plain directions for executors proving and executing the same with the utmost safety to their own estates, and for both their and administrators proceeding to obtain probate of a will or administration from the prerogative court, when residing at any or the most distant part of the nation.

HERE he has proceeded on the law relative to bills of exchange and promissory notes, tracing it from its origin, and progressively explaining the same, with a view to furnish the reader with a perfect knowledge thereof, and the custom of merchants in every particular concerning those bills and notes; and thereby to enable persons concerned either in drawing, accepting, indorsing, negotiating, or taking the same in payment, to act with propriety and safety, both with respect to their persons and property.

THE

A FAMILIAR
EXPLANATION
OF THE
LAW
CONCERNING
BILLS OF EXCHANGE,
PROMISSORY NOTES, &c.

CHAP. I.

- § 1. *Brief Description of Bills of Exchange and Promissory Notes.*
§ 2. *Stamps whereon the same are required to be written or printed.*
§ 3. *Particulars of the Explanation and Amendment of the Statute 23 Geo. III. c. 49.*

§ 1. **B**ILLS of Exchange are of great antiquity, and are established by the custom of merchants, which is part of the law of this realm,* whereof more particular mention will be made in the latter part of the first section of our sixth chapter.—Till very lately those bills were written or printed on unstamped paper, but now are required, under a certain penalty, to be on such stamps as the legislature hath appointed, concerning which we shall treat in our two following sections. The form of the bill is like that of an open letter of request,

* Law's Disposal, 130.

written on a piece of paper commonly long and narrow, from one man to another, desiring him to pay a sum of money named therein to a third person on his account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. This method is of great antiquity, the invention whereof being when the Jews were banished out of Guienne in 1287, and out of England in 1290; when the more easily to draw their effects out of France and England into those countries in which they had chosen to reside, they pursued this method, which soon after became of general use. In common speech such a bill is frequently called a *draught*, but a *bill of exchange* is the more legal as well as mercantile expression. The person who writes it, is called in law the *drawer*, and he to whom it is written the *drawee*; and the third person, or negotiator, to whom it is payable (whether specially named or the bearer generally) is called the *payee*.

THOSE bills are either *foreign* or *inland*; *foreign*, when drawn by a merchant residing abroad upon his correspondent in England, or *vice versa*; and *inland*, when both the drawer and drawee reside within the kingdom. Formerly foreign bills of exchange were more regarded in the eye of the law than inland ones; but now, by statutes 9 & 10 W. III. c. 17. and 3 & 4 Ann. c. 9. inland bills of exchange are put upon the same footing as foreign ones, what was the law and custom of merchants with regard to the one, and taken notice of merely as such, being by those statutes expressly enacted with regard to the other.

PROMISSORY notes, or notes of hand, are a plain and direct engagement in writing, to pay a sum of
of

of money specified at a time therein limited to a person therein named, or to his order, or to the bearer at large; concerning which particular mention will be made in our two next ensuing chapters. Those notes, as well as bills of exchange, are, as before hinted, to be on paper, vellum, or parchment, stamped with such stamps as the legislature hath lately required, and of which we are now about to treat.

§ II. BY statute 23 Geo. III. c. 49. whereby the statute 22 Geo. III. c. 33. is repealed, it is enacted, that from and after the first day of August, 1783, for every piece of vellum or parchment, or sheet or piece of paper, upon which any foreign or inland bill of exchange, promissory note, or other note, draft, or order, shall be ingrossed, written, or printed, where the sum expressed therein or made payable thereby, shall not amount to the sum of 50l. there shall be charged a stamp duty of 6d. and if such sum amount to 50l. or upwards, 1s.

BUT this act does not extend to charge any draft or order for the payment of money on demand, upon any banker or any person or persons acting as a banker within ten miles of the place of abode of the person or persons drawing such draft or order; or to charge any receipt for any money paid into the bank of England, or the house of any banker; or any receipt or other discharge, given for any money received on any dividend, payable from the publick or government funds established by parliament, or any receipt given on the back of any bill of exchange, promissory, or other note stamped in pursuance of this act; or upon any bank note, or bank post bill; or to any letter acknowledging the safe arrival of any bills, notes, or remittances, or any receipt indorsed on or con-

tained in the body of any deed, &c. already directed to be stamped by any law now in being.

NOR does it extend to charge any bill of exchange, promissory, or other note, draft, or order, payable upon demand, issued in Scotland, where the sum expressed therein shall not exceed 20s. Nor, to charge any bill of exchange, promissory, or other note, draft, or order, payable upon demand, where the sum expressed therein shall not amount to the sum of 10l. with any higher stamp duty than 3d. Nor doth any thing herein contained extend to charge any receipt given upon the back of any *foreign* bill of exchange.

AND hereby it is enacted, that, no *foreign* bill of exchange, promissory note, or other note, draft, or order, shall be charged with any higher stamp duty than 6d. but that every duplicate and triplicate of such *foreign* bill of exchange, &c. shall be chargeable with the like stamp duty of 6d. That all promissory and other notes, and bills, issued by the governor and company of the bank of England, shall be exempted, in consideration of their paying 12,000 l. *per annum* into the receipt of his Majesty's Exchequer, by half yearly payments. That the duties payable by this act on any bill of exchange, promissory note, or other note, shall be paid by the person or persons giving the same.

§ III. BY statute 24 Geo. III. c. 7. (made to explain and amend the statute of 23 Geo. III. c. 49.) it is enacted, that after the 25th day of March, 1784, all and every person or persons, who shall write or sign, or cause to be written or signed, any bill of exchange, promissory, or other note, liable to any stamp duty charged by the former act, upon any piece of vellum, parchment, or paper, without the
same

same being first duly stamped, as in and by that act directed, shall for every such bill of exchange, &c. so written or signed, forfeit and pay the sum of 5l. to be recovered and applied as in and by that act is directed, or in manner directed by this act.

AND it is hereby enacted, as that it might prevent invasions, that all drafts or orders on bankers, for the payment of money on demand, which were exempted from duty by the former act, shall be drawn payable to the bearer, otherwise be liable to the same stamp duties imposed by the former act upon foreign or inland bills of exchange, promissory or other notes, drafts, or orders: but, as it was intended by the former act not to subject any note, draft, or order, to stamp duty, which should be given for any sum not amounting to 40s. by this act it is enacted, that no stamp duty shall be required for or on account of any such draft, &c. legally given, wherein the sum expressed therein does not amount to 40s.

AND that no bill of exchange, promissory or other note, required to be stamped by the former act, shall be permitted to be stamped at any time after the same shall have been written or signed, unless upon payment of the sum of 10l. and that offences against this or the former act, which subject the offender to the penalty of 5l. for writing or signing, or causing to be written or signed, any bill of exchange, promissory or other note, without the same be first duly stamped, may be determined by any neighbouring justice of the peace, who, by this act is authorized and required, upon any information exhibited, or complaint made, in that behalf to summon the party accused, and the witnesses on either side, and to examine into the matter of fact; and upon due proof made thereof, either by the vo-

luntary confession of the party, or the oath of one or more credible witness or witnesses, to give judgment or sentence for the penalty or forfeiture, and to award and issue out his warrant under his hand and seal, for levying the penalty on the goods of the offender; and to cause sale to be made thereof, if not redeemed within six days; and where goods are not to be found sufficient to answer the penalty, to commit such offender to prison, there to remain for the space of three months, unless such pecuniary penalty shall be sooner paid and satisfied.

BUT persons aggrieved may, on giving security to the amount of the value of such penalty, together with such costs as shall be awarded in case such judgment be affirmed, appeal to the next general quarter sessions, which shall happen after fourteen days next after such conviction shall have been made. And no person shall be liable to be convicted for any offence against this or the former act, unless complaint or information be made against him within a year after the offence committed.

C H A P. II.

- § 1. *Restraint on the Negotiation of Bills and Notes drawn for less than 20s. and 5l.*
- § 2. *Bills and Notes not negotiable if payable out of particular and uncertain Funds, or upon contingent and uncertain Events.*
- § 3. *Negotiable Notes and Bills.*
- § 4. *The Nature and Effects of Bills of Exchange and negotiable Notes. 1. As Securities, and different from Bank Notes. 2. As Choses in Action, in which Executors and Administrators are interested. 3. As being assignable by Indorsement. 4. As to Bills accepted. 5. Protest on Acceptance refused, and giving Notice. 6. Protest on Non-payment, and giving Notice thereof. 7. Persons liable to Payment. 8. As to the Similitude between Bills of Exchange and Promissory Notes. 9. The Nature and Effects of Bills and Notes as being simple contract Debts.*

BILLS of exchange and promissory notes, having been briefly described in our preceding chapter, and the stamps whereon the same are required to be written or printed pointed out ; we shall in our first and second section of this, treat of the restraint on negotiating such as are drawn for less than 20s. and 5l. and those which are not negotiable, as being payable out of particular and uncertain funds, or upon contingent and uncertain events. In our third section hereof treat on negotiable bills and notes ; and in our fourth, on the nature and effects thereof, under the several propositions above laid down ; from which, with what has been briefly touched upon towards the beginning of our preceding chapter, the reader will be enabled to form a conception of the different subjects contained in the

following sheets, and to make a speedy discovery of divers material points which he might be in pursuit of.

§ I. BY statute 15 Geo. III. c. 51. after reciting that various notes, bills of exchange, and drafts for very small sums of money, had for some time past been circulated or negotiated in lieu of cash in England, to the great prejudice of trade and public credit; and many of such bills and drafts being payable under certain terms and restrictions, which the poorer sort of manufacturers, artificers, labourers, and others, could not comply with, without being subject to great extortion and abuse: it is enacted, that all notes, bills, drafts, or undertakings in writing, being negotiable or transferrable, for the payment of any sum or sums of money, less than 20s. in the whole, which shall be made and issued after the 24th of June 1775, shall be void. And that if any person by any means whatever, publish or negotiate any such notes, &c. or on which less than 20s. shall be due, he shall pay 20l. or not less than 5l. the same to be recovered in such manner as we shall hereafter mention.

By statute 17 Geo. III. c. 30. after reciting the above-mentioned act of 15 Geo. III. and that the same had been attended with very salutary effects; and that in case the provisions thereof were extended to a further sum, the good purposes of it would be further advanced: it is enacted, that all promissory or other notes, bills of exchange, or drafts, or undertakings in writing being negotiable or transferrable, for the payment of 20s. or above, and less than 5l. that shall remain undischarged, and made within England, after the 1st of January 1778, shall specify the names and places of abode of the respective persons to whom, or to whose order the same

same shall be made payable, and shall be dated before or when drawn, and not on any subsequent day, and be payable within 21 days after their date, and not negotiable after their time of payment; and that every indorsement shall be before the time of payment, and be dated at or before the time of making thereof; and shall specify the name and place of abode of the person to whom, or to whose order, the money is to be paid; and that the signing of every such note, &c. and indorsement, shall be attested by a witness, and drawn agreeable to the forms described in the act, the substance whereof are as follows:

No. I.

Manchester, 5th June, 1778.

Twenty Days after Date, I promise to pay *Abraham Craft*, of *Petter-Lane, London*, or his Order, the Sum of Four Pounds Fourteen Shillings,^b for Value received by

David Evans.

Witness
Francis Goring.

And the indorsement, *toties quoties*.^c

12th June, 1778.

Pay the Contents to *Henry Jenkins*, of *Cheapside, London*, or his Order.

Abraham Craft.

Witness
Katharine Surry.

^b For this the stamp duty is six-pence; as shewn in our first chapter.

^c *Toties quoties*, are words used in statutes, deeds, and conveyances, and signify as often as a thing shall happen.

No. II.

Exeter, 20th July, 1778.

Twenty-one Days after Date, pay to *Moses Newel*,
of *Fleet-Street, London*, or his Order, the Sum of
Three Pounds, Value received, as advised by

Oliver Prade.

To *Richard Syms, of Shoreditch, in*
the County of Middlesex.

Witness
Thomas Urn.

And the Indorsement, *toties quoties.*

Pay the Contents to *William Yates, of Milk-Street,*
Cheapside, London, or his Order.

Moses Newel.

Witness
Andrew Baker.

THOSE being in effect the forms pointed out by this statute, it is thereby enacted, that all notes, &c. being negotiable or transferrable for the payment of 20s. or in which 20s. or above, and less than 5l. shall be undischarged, and issued within England, at any time after the 1st January 1778, in any other manner than as aforesaid, and also every indorsement shall be void. And the publishing or negotiating in England any note, &c. of or under the above-mentioned value, made in any other manner than by this act permitted, and also negotiating such last-mentioned notes, &c. after the time aforesaid, is prohibited; under the like penalties and forfeitures, and to be recovered and applied as directed by 15 Geo. III. c. 51. which is by summary proceedings

proceedings before a justice of the peace. And by statute 17 Geo. III. all notes, &c. issued before 1st of January 1778, to be payable within England on demand, and recoverable as directed by act of 15 Geo. III. with respect to notes, &c. issued before 24th June 1775; and all matters contained in 15 Geo. III. are to be in force in England as to notes, &c. issued after 1st January, 1778, and previous thereto.

By statute 17 Geo. III. both these acts were to continue in force, not only for the residue of five years in the act of 15 Geo. III. mentioned, but also for the further term of five years. And by statute 27 Geo. III. c. 16. both are made perpetual.

§ II. BILLS and notes are not negotiable if payable out of particular and uncertain funds; or upon contingent and uncertain events; a demonstration whereof we have in the following cases. In the case of *Jenney against Herle*, 3 Geo. I. where A. drew a bill in this form; *Sir, pray pay to H. 1945l. upon demand, out of the money belonging to the proprietors of the Devonshire mines, being part of the consideration money for the purchase of the manor of West-Buckland.* It was held that this was no such bill of exchange as would entitle H. to an action against the drawer on the custom of merchants; for it is only a direction or appointment to the cashier to pay the money, and that out of a particular fund, and does not answer the necessity of trade, not being a negotiable note nor indorsible over; and charging the drawer on such a note, would be liable to this further inconveniency, that hereby every one who gives his steward an order or authority to pay money, might be charged for non-payment.^d So in the case of

^d Strange, 591.

Jocelyn against *Laferre*. 1 Geo. I. where a bill was drawn by an officer upon his agent, requiring him to pay so much out of his *growing subsistence*, was held no bill of exchange, nor the drawee liable, though he accepted such bill; for it concerns neither trade nor credit; but is to be paid out of the growing subsistence of the drawer; so that if the party die, or the fund be taken away, the payment is to cease and determine. And it would be of dangerous consequence to make those orders which a man gives to his steward or bailiff, no way concerning trade, to be bills of exchange.*

In the case of *Smith* against *Bobene*, Mich. 1 Geo. I. where a note was, *I promise to pay 50l. or render the body of J. S. to prison before such a day*; it was adjudged to be no negotiable note within the statute 3 & 4. Ann. and that an action could not be maintained thereon within that law; because the money was not absolutely payable, but depended upon a contingency whether he would surrender J. S. to prison or not.†

In the case of *Roberts* against *Peake*, Easter, 30 Geo. II. where the note was, *we* (naming the defendant and another person) promise to pay to A. B. 116l. 11s. (value received) on the death of George Henshaw; provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay it. The note was signed by the defendant *only*, and an action was brought thereon against him by the indorsee. The plaintiff's counsel on the question, whether this be a negotiable note? argued that there could be no doubt but that, if the note had not the proviso added to it, but had mere-

* L. Raymond, 1361.

† Ibid. 1362.

ly been made payable on the death of George Henshaw, it had been a good negotiable promissory note, within the statute of 3 & 4 Ann. c. 9. For the contingency of the death of G. H. is not such an uncertain contingency, as that the event may possibly or probably never happen; and so the note might perhaps never become payable. But it is an event certain and necessary; and no otherwise nor in any other respect uncertain, than merely as to the particular time when it will happen: so that it is no more than the ordinary case of a promissory note payable at a future day. And to prove this doctrine and that this is a negotiable note, he cited the case of *Cooke against Coleban* [mentioned in our next ensuing section] and the case of *Andrews against Franklin* [the case next following this]. And argued that, as to the proviso or condition, it is made absolutely payable on George Henshaw's death, an event which will certainly happen; therefore the proviso is repugnant to the body of the note.

BUT by Lord Mansfield: This note was payable upon a contingency; and therefore it was not an absolute note. What would it signify, to have put all these contingencies, if the party was absolutely, and at all events bound to pay it upon the death of George Henshaw? Most manifestly, it was not intended that he should be bound to pay it upon George Henshaw's death, at all events. This note therefore being payable upon an uncertain contingency, is not a negotiable note.—Justices Denison and Foster, herewith concurring. Judgment was by the court, for the defendant.^s

IN the case of *Andrews against Franklin*, Hil. 3 Geo. I. in an action upon a promissory note to pay

^s Burr. Rep. 226

within two months after such a ship is paid off. The plaintiff declares upon the statute of Queen Anne. The counsel for the defendant insisted, that this is not a negotiable note, it being upon a contingency which may never happen. *Jocelyn* and *Laferre* [the case before mentioned], was a bill to pay out of the drawer's growing subsistence; and that was held not to be negotiable as a bill of exchange. But by the court: The paying off the ship is a thing of a public nature, and this is negotiable as a promissory note.^a

In the case of *Dawkes* and *Wife* against *The Earl of Deloraine*, Trin. 11 Geo. III. a bill was drawn as follows. "8th January, 1768, seven weeks after date, pay Miss Read, [wife of *Dawkes* when the action was brought] 32l. 17s. out of W. Steward's money, as soon as you shall receive it, for

"Your humble servant,

"*To Timothy Brecknock, Esq.*

"*Deloraine.*"

"St. Mary-le-bone."

THIS bill was accepted by Brecknock, who afterwards refused to pay it. On demurrer, Davy, counsel for the defendant, insisted, 1st, that this is no bill of exchange. 2dly, That, if it be, still the defendant is not, at present, chargeable.—Leigh, counsel for the plaintiff, argued, that Brecknock's acceptance was an acknowledgment of his having received the money.

By the court: The bill is drawn payable out of a particular fund, and upon an event which is future, uncertain and contingent, viz. the drawee's having

^a Strange, 24.

received

received W. Steward's money. A bill of exchange always implies a personal general credit, not applicable to particular circumstances or events; which cannot be known to the holder of the bill; in a general course of negotiation. *Andrews and Franklin* [the case above mentioned] seems indeed an exception to this rule. A promissory note to pay a sum, when the ship Devonshire was paid off. But, in the first place, that was a promissory note, and not a bill of exchange; and a note may be certainly payable on a future event. Nor again was the note payable, out of the ship Devonshire's fund; but was given on the general credit of the drawer, though payable at a future and uncertain time. But, as this is a hard case, (to say no more of it) we will not give our judgment absolutely; but having thus declared our opinions, let there be judgment for the defendant; unless cause shewn to-morrow.—On the morrow, Leigh, plaintiff's counsel, moved, for leave to enter a *non vult prosequi* on the first count in the declaration; and had a rule to shew cause which was made absolute the last day of term.¹

§ III. THAT notes and bills may be negotiable, the same must be made payable certainly and at all events, otherwise notwithstanding these may have the resemblance of negotiability, they cannot be negotiable, as appears by the cases we have just been relating.

In the case of *Cook against Colehan*, 18 Geo. II. in the Court of Common Pleas. A note *to pay to A. or order, six weeks after the death of the defendant's father, for value received*, was held to be a negotiable note, within the statute 3 & 4 Anne, c. 9. for there is no contingency whereby it may never

¹ 2 Black. Rep. 782.

Become

become payable, but it is only uncertain as to the time, which is the case of all bills payable so many days after sight. In the Common Pleas it held three arguments, and was held good upon a solemn resolution delivered by Chief Justice Willes.*

IN the case of *Goss against Nelson*, Hil. 30 Geo. II. judgment was obtained in an action upon a promissory note, given to an infant, payable *when he, the (infant) shall come of age, which will be June 12, 1750*; and the defendant's counsel having moved to arrest the judgment, for that this was not a good note within the statute 3 & 4 Anne, c. 9. which gives like remedy, upon promissory notes, as upon bills of exchange. In answer to which the counsel for the plaintiff cited the above mentioned case of *Cook against Coleban*.

By Lord Chief Justice Mansfield: It would have been clearly good, if it had been made payable on the 12th June, 1750, that is to say, on a day certain, without mentioning the plaintiff's being then to come of age; and surely this is not the less certain, for *adding* that circumstance. The former part of the note is a promise to pay the money, and the rest is only fixing the particular time when it is to be paid; it is enough, if it be certainly at all events payable at that time, whether he lives till then, or dies in the interim. This is a good note within the remedial statute. A contingent note, where it is uncertain whether the money shall ever become payable at all, or not, is another case: such a note is not within the statute, and therefore I think this is a good note within the statute 3 & 4 Ann. c. 9, and the court being of the same opinion, they agreed that this was *debitum*

* *Sirange*, 1217.

in presenti, though *solvendum in futuro*; that is, a present debt, though to be paid in future.

§ IV. AS to the nature and effects of bills of exchange and negotiable notes: 1. A bill of exchange as well as a promissory note, ordained by statute 3 & 4 Ann. is a security, and differs from a bank note, which is as money itself; as shewn in the 5th section of our tenth chapter. But this security is not such as will prevail against the privilege of infants, or persons under twenty-one years of age, who are by law stiled infants till then, so as to bind them; wherefore if an infant draw a bill of exchange, infancy is a good plea *in bar* to an action brought against him. If a merchant abroad or a gentleman who is no trader, draw a bill of exchange on a merchant here, or *vice versa*, requesting him to pay a sum of money, and the drawer sets his name to it, this amounts to a promise to pay; and as by the express contract of the drawer, the payee of a promissory note has clearly a property vested in him, so has the payee of a bill of exchange by the implied contract of the drawer, *viz.* that provided the drawee does not pay the bill, he will: for which reason it is usual, in bills of exchange, to express that the value thereof hath been received by the drawer; in order to shew the consideration upon which the implied contract of re-payment arises. By this implied contract the drawer, in case acceptance be refused, is liable to an action upon

1 Barr. Rep. 226. infants incapability of securing

2 Law's Disposal, 138, 139. payment even for necessities;

3 Cartwright, 160. In the case of Truman against Hurst, Mich.

26 Geo. III. were cited a variety of cases on the subject of

Durnford and East Rep. 40. Cro. Jac. 306. Cro. Ca. 301.

the bill, although the time of payment is not come, as shewn in the ninth section of our fourth chapter.

2. BUT as to this property which although vested, yet it is not in possession, but in action, and termed in law a *chose* in action, being a thing rather *in potentia*, or in power, than *in esse*, or in being: though the owner may have as absolute a property in, and be as well entitled to, things in action, as to things in possession; for with respect to bills and notes, as well as bonds and contracts of divers kinds, also termed choses in action, the law gives an action to the party injured in case of non-performance, to compel the wrong-doer to do justice; and in actions arising *ex contractu*, by breach of promise, and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against, or by the executors or administrators, being indeed rather actions against the property, than the person, in which the executors or administrators have now the same interest that the testator or intestate had before.* And with respect to the express contract of the drawer of a promissory note, or the implied contract of the drawer of a bill of exchange, who dies before it be fulfilled, the same must be answered by his executors or administrators, if there be assets, of which we shall again make mention in our ninth paragraph, towards the conclusion of this section; and in the third section of our fifth chapter treat on what is to be done with respect to demand and protest, in case the drawee of a bill of exchange dies after acceptance, or if he to whom the bill is to be paid dies; and in the seventh section of our sixth chapter, on indorsement by executors and administrators.

* Law & Disposal, 22. 5 edit.

3. AND now proceed with mentioning, that by the general rule of the common law, no chose in action is assignable; and when a debt or bond is assigned over, it must nevertheless be sued for in the original creditor's name; the person to whom it is transferred being rather an attorney than an assignee; but the vested property in bills of exchange and negotiable promissory notes, may be transferred and assigned from the payee to any other man, contrary to this rule; which leads us to touch upon indorsements, and to drop some hints concerning a few principle incidents attending this transfer or assignment by indorsement; whereby the drawer may be charged with the payment of the debt to other persons than those originally contracted with.

THE payee or person to whom, or whose order, a bill of exchange or promissory note is payable, and where the sum therein expressed amounts to 5l. or upwards, may by indorsement, or writing his name on the back of it, as is the general method, and is commonly termed a blank indorsement, or by particularly directing it to be paid to the bearer, or another person by name, assign over his whole property; and the person to whom it is thus assigned is then called the indorsee; and he may assign the same to another, and so on *in infinitum*, as more fully shewn in the first section of our sixth chapter.

4. IN case of a bill of exchange, the payee or indorsee (whether it be a general or particular indorsement) is to go or send to the drawee, and offer his bill for acceptance; which acceptance (so as to charge the drawer with costs) must be in writing under or on the back of the bill. If the drawee accepts it either verbally or in writing, (concerning which we shall copiously treat in our fourth

C 2

chapter)

chapter) he makes himself liable to pay it; this being now a contract on his side, grounded on an acknowledgment that the drawer has effects in his hands, or at least credit sufficient to warrant the payment. - But if acceptance be refused, an action will lie upon the bill against the drawer, though the time of payment is not come, as we have before hinted.

5. If the drawee refuses to accept the bill, and it be of the value of 20l. or upwards, and expressed to be for value received, the payee or indorsee may protest it for non-acceptance; which protest must be made in writing under a copy of the bill, by some notary public; or, if no such notary be resident in the place, then by any other substantial inhabitant, in the presence of two credible witnesses; and notice of such protest must be given, or the protest itself sent to the drawer. Concerning which we shall treat particularly in different parts of our fifth chapter, the subjects whereof will be on the protest.

6. In case the bill of exchange be accepted by the drawee, and after acceptance he fails or refuses to pay it, within three days after it becomes due, (which three days are called days of grace, as treated on more particularly in the first section of our next ensuing chapter) the payee or indorsee is then to get it protested for *non-payment*, in the same manner and by the same persons who are to protest it in case of non-acceptance: and such protest must also be notified to the drawer; and he, on producing such protest either of non-acceptance or non-payment, is bound to make good to the payee, or indorsee, not only the amount of the said bill, (which by the rules of the common law he is bound

bound to do within a reasonable time after non-payment, without any protest) but also interest and all charges, to be computed from the time of making such protest. If no protest be made or notified to the drawer, and any damage accrues by such neglect, it will fall on the holder of the bill, which when refused must be demanded of the drawer as soon as conveniently may be; concerning which, and of giving notice to the drawer or indorser, we shall treat in our fifth and ninth chapters.

HENCE it may be observed, that although when one draws a bill of exchange, he subjects himself to the payment, if the person on whom it is drawn refuse either to accept or pay; yet it is with this limitation, that if the bill be not paid when due, the person to whom it is payable shall in convenient time give the drawer notice thereof; otherwise the law will imply it paid: as it would be prejudicial to commerce, if a bill might rise up to charge the drawer at any distance of time; when in the mean time all reckonings and accounts may be adjusted between the drawer and drawee.

7. IN case the bill be indorsed, and the indorsee, or the person to whom it is indorsed, cannot get the drawee to discharge it, he may call upon either the drawer or indorser; or if the bill has been negotiated through many hands, upon any of the indorsers; as each is a warrantor of the payment thereof, the same being frequently taken as much (if not more) upon the credit of the indorser, as of the drawer; and if the indorser, so called upon, has the names of one or more indorsers prior to his own, to each of whom he is properly an indorsee, he may also call upon any of them to make him satisfaction; and so upwards: but in this case the first indorser can resort to no one besides the drawer;

which will be more fully demonstrated in our tenth chapter, the principal subjects whereof will be on suing the parties; and now we shall proceed to a conclusion of those outlines by making a few more brief observations.

8. As that what has here been said concerning bills of exchange that are indorsed over, and negotiated from one hand to another, it may be observed, is applicable also to promissory notes; only that the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing; and in this case as there is no drawee, there can be no protest for non-acceptance: but in case of non-payment by the drawer, the several indorsees of a promissory note have the same remedy, as upon bills of exchange against the prior indorsers; and hereof we shall treat more particularly in the fourth and following sections of our next ensuing chapter, and in the fourth section of our tenth.

9. AND as we have in the former part of this section mentioned that those bills and notes are securities, here it may be observed, that the same are not of so high a nature as bonds or specialties, but are simple contract debts; and being within the statute 21 Ja. I. c. 16. commonly called the statute of limitations, no action can be brought for money due thereon after six years from the time the same became due; unless it be under particular circumstances, which are exceptions in the act; as with respect to infants, persons beyond sea, and some others; or unless the debt hath been revived by the debtor's acknowledging the same, and promising payment thereof within the six years.—If

* Law's Disposal, 202. 5 Edit.

there

CHAP. II. § IV.

there are several drawers of a joint and several promissory note, the acknowledgment of one out of them takes it out of the statute of limitations, as against the others, and may be given in evidence on a separate action against any of the others.* On evidence we shall copiously treat in our eighth chapter; and concerning interest on notes of hand, mention will be made in the seventh section of our third chapter: and of interest on bills of exchange we have heretofore made mention in our sixth paragraph; and hereon more will be said in the first section of our fourth chapter.

AND here we may again observe, as with respect to those bills and notes being simple contract debts, that the same are the last class of which an executor or administrator is to pay in course of administration;† and if he pays them before debts of a higher degree, he must pay the latter out of his own estate, where there is a deficiency of assets.‡ Likewise, in case of death, where there are *bona notabilia*, or goods to the value of 5l. in two bishop's dioceses, whereby administration or probate must be taken before the metropolitan, debts owing to the intestate by bond or other specialties, are *bona notabilia* in the diocese where the bond or specialties be, and not where the debtor inhabits; but if the debts be only by simple contract, then they are to be esteemed *bona notabilia* in the place where the debtor is; as a bill of exchange shall be said to be *bona notabilia* where the debtor is, and not where the bill is.¶

* *Case of Whitcomb. v. Whiting*,
Easter, 20 Geo. III. Doug. Rep.
652. 2 Edit.

† Law's Disposal, 57.

‡ *Ibid.* 51.

¶ *Ibid.* 6.

C H A P. III.

- § 1. *Of Inland Bills of Exchange; how the same should be drawn. Of drawing them by one Person for another in his Absence. Time wherein to be paid. Forms thereof, and Remarks thereon.*
- § 2. *Foreign Bills of Exchange; their Times of Payment. Of drawing and protesting them.*
- § 3. *Of Drafts on Bankers payable on Demand. Time wherein to be tendered for Payment.*
- § 4. *Of Negotiable Notes; the Statute 3 & 4 Anne, and it's Intent.*
- § 5. *Notes of Hand void when obtained for Money won at Play, or on Usurious Contracts; and may be avoided by an illegal Consideration set up by the Defendant against an Action thereon.*
- § 6. *Effect of Notes payable to Bearer. Resemblance between a Note and a Bill of Exchange, and of demanding the Money on either. Distinction between a Note payable to Order or Bearer; and the Effect of receiving Part from Drawer or Indorser.*
- § 7. *Of Interest on Notes of Hand. What may be a Negotiable Note, and what is indisputably so; how most usually drawn. Of the Time wherein to be paid, and allowing three Days Grace thereon. Forms thereof.*

HAVING concluded our next preceding chapter with briefly treating on the nature and effects of bills of exchange and negotiable notes, we shall here progressively enlarge upon divers points lightly touched upon in both the preceding chapters; and in our first section treat on inland bills of exchange; how the same should be drawn; time wherein to be paid, and lay down the usual forms thereof, with remarks thereon; and as there is some difference between foreign and inland bills, with respect

spect to the times of payment, protesting, and manner of drawing; we shall treat on these particulars in our second section. In our third, on drafts on bankers payable on demand, and the time in which the same should be tendered for payment. Then proceed with the subsequent sections; and in our seventh and last, treat on what may be a negotiable note; and what is indisputably so; and lay down the usual forms of negotiable notes. And from the subjects of this chapter we shall have a conspicuous view of such bills and notes as are so indisputably good and negotiable, as may be taken with safety in the course of trade; attention being had to the responsibility of the drawer, acceptor, and indorser of a bill of exchange, and the maker and indorser of a promissory note; and that the bill or note was not obtained for money won at play, or on a usurious contract, whereby the same will be void even in the hands of an innocent indorsee, who hath his remedy only against the indorser; as hinted in the fifth section of this chapter; and in the fourth and fifth sections of our seventh chapter shewn that the case is different with respect to bills stolen or forged.

§ I. INLAND bills of exchange, are usually drawn payable at such times as the drawer and payee, or person to whom payable agree on, which may be on a certain fixed and appointed day; though are most commonly drawn at sight, so many days after sight, or so many days, weeks, or months, after date. The same must be made payable certainly and at all events, as shewn in the second section of our next preceding chapter; and should be drawn according to the usual and proper method payable to the payee or order; for this difference has been taken between a bill payable to J. S. or *bearer*, or J. S. or *order*; that the first is
not

not assignable by the contract, so as to enable the indorsee to bring an action if the drawer refuse to pay; because there is no such authority given to the party by the first contract, and the effect of it is only to discharge the drawee if he pays it to the bearer, though he comes to it by trover, theft, or otherwise; but when the bill is payable to J. S. or order, there an express power is given to the party to assign, and the indorsee may maintain an action.^a And a bill payable to a man's order is payable to himself, and he may bring an action averring he made no order.^b

BUT it is now held, that bills payable to bearer are negotiable, like other bills of exchange, and the bearer may maintain an action thereon in his own name; or he may recover on the bill in an action for money had and received to his use; whereof we have treated in the sixth section of our sixth chapter.

THE drawer of a bill should therein express *value received*, which is required by the statutes 9 & 10 W. III. and 3 & 4 Anne, with respect to protesting; as shewn in the first section of our fifth chapter; and, according to the case of *Banbury* against *Lisset* and *Gilly*, 17 Geo. II. it seems absolutely necessary in a bill of exchange; though it has been said to be otherwise, and that when those words *value received* are mentioned in the bill, the drawer must answer it at common law, and if they are not mentioned, then by the custom of merchants.^c

IN the case of *Pierce* against *Wheatley*, at the sittings after Trinity term, 1742. In case for

^a 1 Salk. 123. 125.

^b Strange, 1211.

^c Law of Nisi Prius, 273.

^d Show. 5.

money had and received to the plaintiff's use, the defendant pleaded *non assumpsit*, and gave notice to set off the following bill of exchange, directed to J. S. "Sir, at six weeks after date pay to Benjamin Wheatley, Esq; or order, eight guineas, for your humble servant, John Pierce. London, August 23d. 1736." At the trial it was objected, and agreed by the court, first, that this was not a bill of exchange within the custom of merchants, nor could be taken advantage of as such, either by way of set-off, or by an action brought upon it; nor would it be any sort of evidence of money lent, *there being no consideration, either appearing on the note or offered to be proved*, and it is nothing more than a bare power or authority to receive so much to the plaintiff's use.*

WITH respect to bills drawn by one person for another in his absence. No person can regularly draw a bill for another in his absence, unless properly authorised by a letter of attorney or otherwise, notwithstanding which, it is commonly practised by clerks, &c. and if it can be proved, that a merchant hath frequently paid bills of their acceptance, they will be recoverable by law.

As concerning the time wherein inland bills of exchange are to be paid. If a bill is drawn payable some weeks after date or sight, the weeks must be reduced into days, counting seven to the week, the first whereof commences on the day next ensuing the date of the bill, or the date of acceptance (if payable after sight). If drawn payable one or two months after sight or date, then the day of payment falls on the same day in the succeeding month, &c. from that in which the bill was pre-

* Viner's Abr. tit. Bills of Exchange, (A) 20.

sented and dated for acceptance, or dated by the drawer, although the months differ in the number of their days. Thus, where a bill is dated by the drawer the 7th of *January*, and drawn payable a month after date, the same is payable the 7th of *February* (not the 8th). And for paying those bills three days (called days of grace) are allowed after the time mentioned for payment; but if the same are made payable at sight, they are to be satisfied without any days of grace to be allowed. If made payable some days, or even but one day after sight, their acceptance is dated on the day they are presented; and on the day next ensuing the date of the acceptance commences the days of their running, and the acceptor has the three days grace.

PREVIOUS to laying down the usual forms of those bills, we may just hint, that if a bill should not be drawn exactly to the usual and common form, it may have the effect of a bill of exchange, provided it be made payable certainly and at all events, and not out of a particular and uncertain fund, or upon a contingent and uncertain event; whereof we have treated in the second section of our next preceding chapter.—It is said (2 *Ld. Raym.* 1397) there are no precise words required to be used in a bill of exchange; yet it is perceivable by that part of our work just now alluded to, that a writing may have the form of a bill of exchange and yet be otherwise.—The forms here proposed to be laid down are as follows:

No. I.

No. 5.^a 48*£*. BRISTOL, 6th March, 1788.

At fifteen Days sight, pay to Mr. Andrew Beale, or Order, Forty-eight Poundr, Value received, and place the same to account, as per advice,^c [or without further advice] from

To Mr. Edward Field, *Charles Denison.*
Banker, LONDON. 9th March, 1788.

Accepted, E. F.

Indorsement.

Andrew Beal.^e

^a When the drawer draws a bill or draft on a banker, or person on whom he frequently draws, the same is usually numbered.

^b Where the sum drawn for is under 5*l*, the duty is 6*d*. When the sum is 5*l*. or upward, 1*s*. Where it does not amount to 40*s*. no duty is required. Nor on drafts on bankers, payable to bearer on demand, drawn for any sum whatever, by persons living within ten miles of such bankers, And drafts payable on demand, on any other person, where the sum is under 10*l*. the duty is only 3*d*. as shewn at large in the second and third sections of our first chapter.

^c When a bill is drawn, the drawee is generally advised thereof by a letter from the drawer, in which case the words "per advice" are inserted as above, and if no advice is given, then the words "without further advice."

^d The above acceptance, being on the 9th March, the day whereon the bill becomes payable, will be the 24th, to which being added the three days grace, the time for payment of the bill will be on the 27th. On acceptance we have copiously treated in our fourth chapter.

^e This is the general method of indorsement, made on the back of a bill, and is commonly termed a blank indorsement, as mentioned in the fourth section of our second chapter, and in our sixth chapter; the subjects whereof are on indorsements; in the first section thereof, it is shewn that this is the most safe and proper.

No. II.

50 £.

LONDON, 7th January, 1788.

Three Weeks^f after Date pay to Messrs.
George and Henry Harvey, or Order, Fifty
1s. ft. Pounds, Value received, and place the same
to account, [as in No. I.] from

To Messrs. Lazarus and Matthew James Kemp.
Newcomb, Merchants, BRISTOL.

Accepted,^g L. M.

Indorsement.

George Harvey.^h

^f This being made payable three weeks after date, the same becomes due on the 28th of January, whereto added the three days grace, makes the day for payment to be on the 31st.

^g Where a bill is drawn on two, it must regularly have a joint acceptance; but by the custom of England, where there are two joint traders, and one accepts a bill drawn on both for him and partner, it binds both if it concerns the joint trade; as shewn in the eleventh section of our fourth chapter.

^h Where there are two payees who are not in partnership, both should indorse; this being similar to what is just above mentioned with respect to two drawees, as demonstrated in the fifth section of our sixth chapter.

No. III.

No. III.

70£. MANCHESTER, June 4, 1788.

Thirty Days¹ after Date pay to the Order
of *Mr. Abraham Bond, Seventy Pounds*, Value
received

For Comins, Down, and Evans,
To Messrs. Edward Founder and *Francis Comins.*
Son, Bankers, LONDON.

Accepted, E. F.

Indorsement [as in No. I.]

No. IV.

68£. EXETER, 7th January, 1788.

One Month^{*} after Date pay to me,¹ or my
Order, *Sixty-eight Pounds*, for Value re-
ceived by

To Mr. Samuel Trueman, Linen-
draper, Fore-Street, EXETER.

Accepted, S. T.

Indorsement [as in No. I.]

¹ This being made payable thirty days after date, becomes due on 4th July, and the three days grace being added, the bill is to be paid on the 7th.

^{*} The bill being dated 7th January, and made payable one month after date, becomes due on the 7th of February, and three days grace being added, it is to be paid on the 10th.

¹ Though regularly there ought to be three persons concerned in a bill of exchange, yet there may be only two, as in the above form.

§ II. FOREIGN bills differ from inland as to their times of payment in three respects; as first, when drawn in the forms we have here laid down, and made payable in a country where the stile varies from that in which drawn; as a bill made payable at a certain day, is due on the day mentioned, according to the stile of the place it is drawn on, not where it is drawn from; so that a bill from *Amsterdam* made payable at *Hamburg* on the last day of November, is to be understood that day of old stile, and *vice versa*, for a bill drawn in the same manner from *Hamburg* to *Amsterdam*, the former observing the old stile, and the latter the new.— 2dly. The times as to the days of grace disagree both in the number and commencement of them, in almost all foreign parts; but foreign bills payable in London have three days allowed. 3dly. When those bills are drawn (as they term it) at single, double, or treble usance, which is commonly at one, two, or three months, to be computed from the date of the bill; those usances vary according to the custom of the particular countries; and therefore it is necessary for the plaintiff, when an action is brought, to shew in his declaration what they are; else he cannot have judgment in his suit.^a— In foreign bills, to promote dispatch, and to secure against miscarriages, and other accidents, a set of exchange is generally taken *i. e.* three or four bills of the same tenor and date, each excepting against the others, which are remitted by different posts, ships, or other channels of conveyance; and when one of them is paid, the others are of no force. And in an action on a second bill, it was held not necessary to

form. And when the bill is accepted, credit is given thereto, so far as to make the acceptor liable, and to trust for a repayment to his correspondent. Law of Nisi Prius, 269. Ed. 1785.

^a Law of Nisi Prius, 269, Edit. 1785

aver in the declaration, that the first and third were not paid."

As protesting those bills, will of course be treated on in the second section of our fifth chapter, we shall omit saying any more here thereon, and hence proceed with an account of the above-mentioned days of grace and usances, from the *Lex Mercatoria Rediviva*, and Mr. Gordon's *Universal Accountant*. By those authorities, the days of grace are more or less, according to the customs of the different places drawn upon, viz.

	Days.
Great Britain and Ireland,	3
Amsterdam, Rotterdam, Middleburg, Cologne, Breslaw,	6
Nuremberg, Venice, and Portugal,	10
France, Dantzick, and Koningberg,	14
Spain,	30
Geneva,	8
Naples,	15
Rome,	4
Frankfort,	5
Leipsic, Naumberg, and Augsbury,	12
Hamburg and Sweden,	

In the other parts of Italy not mentioned, the possessor of a bill hath the days of grace arbitrary to himself, there being no fixed time which the acceptor can claim. *Sundays* and holidays are every where included in the days of grace.

With respect to Usance.

The usance of London to and from	France,	Antwerp,	} 1 Kalender Month.
	Hamburg,	Brabant,	
	Amsterdam,	Zealand,	
	Rotterdam,	Flanders,	
	Middleburg,		

Spain, Portugal, — 2 Kalender Months.

Usance to the different parts of Italy, — 3 Kalender Months.

The usance of Amsterdam upon	{	<i>Italy, Portugal, Spain, —</i>	2 Months
		<i>France, Flanders, Braban, and all places in Holland and Zealand,</i>	1 Month.
	{	<i>Francfort, Nuremberg, Venice, Hamburg, and Brisslaw, —</i>	14 days sight.

Double usance to or from any of the above places is double the time of the customary allowance of an usance, and half usance in proportion.

§ III. DRAFTS on bankers payable on demand, are usually given by such persons as are not bankers, when bills drawn on them and made payable after date or sight become due; and those who keep cash at a banker's, when they are in immediate want, commonly draw a draft payable to A. B. [the payee] or bearer on demand, and if the residence of the person who draws this draft, be within ten miles of the banker on whom drawn, no stamp duty is requisite, as shewn in the second and third sections of our first chapter.—As for making payments for the purchase of shares in the publick funds or stocks, as also on various other occasions, large drafts are frequently given upon bankers payable to payee or bearer on demand, it seems advisable to take the same to the bankers on whom drawn, without delay.

It is the received opinion, and founded on the custom of merchants in the city of London, that drafts on bankers, payable to A. B. or bearer on demand, ought to be carried for payment on the very day they are received. But in point of law, it has been lately said from the bench, that if the possessor of a draft on a banker, does not keep it longer than twenty-four hours after he receives it, before he tenders it for payment, and within that time the banker stops payment, the drawer is obliged

ged to pay the money. The case was as follows: The plaintiff took the defendant's draft on his bankers Brown and Collinson; the next morning they stopt payment, and the defendant refuses to give cash for his draft, alledging, that if the plaintiff had presented it for payment as soon as possible after he received it, the bankers would have paid it. Earl Mansfield observed, that the whole rested upon custom; and the question to be determined was, whether the plaintiff was obliged to go to the bankers on the day he received the draft, for if he had, it appeared he would have been paid? His lordship said, it was unreasonable to suppose, that a tradesman should be compelled to run about the town with half a dozen drafts, from Charing-cross to Lombard-street, and other places, on the same day. The jury were to consider that twenty-four hours was the usual time allowed, and the plaintiff kept it no longer from being paid, for the next morning the town was alarmed by the bankers stopping payment. The jury, however, found for the defendant; and upon a new trial, the court of king's bench confirmed the verdict.^b

§ IV. NEGOTIABLE NOTES are those made payable certainly and at all events, which are good notes within the statute 3 & 4 Ann; but if payable only upon contingencies it is otherwise, as shewn in the second section of our next preceding chapter. Promissory notes were formerly only considered by the common law, as evidences of a debt, and not assignable or negotiable in their own nature; but it being found necessary to make use of this kind of

* Sittings at Guildhall after Easter Term, 1782.

of money, bankers hours in and about London, are from 9, o'clock in the morning, till 5 in the afternoon.

^b *Lex Mercatoria Rediviva*, 482, Edit. 1783. For payment

credit, it was enacted by the statute 3 & 4 Ann. c. 9. (made perpetual by 7th Ann.) That all notes in writing that shall be made and signed by any person, or by the servant or agent, who is usually intrusted by such person to sign promissory notes, whereby such person shall promise to pay to another, or his order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to such person to whom the same is made payable: and every note made payable to any person, or his order, shall be assignable or indorsable over, and the person to whom such sum of money is by such note made payable, may maintain an action for the same, either against the person who signed such note, or against him that indorsed it, as in cases of inland bills of exchange; and in every such action the plaintiff shall recover his damages and costs.— But it is hereby enacted, that all, and every such action, shall be commenced, sued and brought, within such time as is appointed for bringing of actions, pursuant to the statute 21 Ja. I. of limitations: mentioned towards the end of the fourth section in our next preceding chapter.

IN the case of *Asb* against *Baron*, Trin. 6 Ann. it was adjudged, that a note wrote by the plaintiff, and subscribed by the defendant, is a note made and signed by the defendant within this act of 3 & 4 Ann. for the signing or subscribing is the *lien*,^a and the writing or making is the mechanical part of it.^b

^a Lien is a word used in law of two significations; *personal lien*, such as a bond, covenant, or contract; and *real lien*, a judgment, statute, recogni-

zance, which oblige and effect the land.

^b 3 New Abr. 606.

THIS statute of 3 & 4 Ann. was made with an intent to put promissory notes upon the same footing with inland bills of exchange: but the analogy between the former and latter begins when the note is indorsed over, as mentioned hereafter in our sixth section.

IN common cases, upon an action of *assumpsit* for money lent, the plaintiff may give a promissory note from the defendant in evidence; for the statute 3 & 4 Ann. which enables the plaintiff to declare upon the note, is only a concurrent remedy.^a

§ V. A NOTE of hand, as well as a bill of exchange, will be void if obtained for money won at play, or on a usurious contract, even in the hands of an innocent indorsee, who hath his remedy only against the indorser, as shewn in the first and second sections of our seventh chapter; and a defendant may set up an illegal consideration against an action on a note of hand, as in the case of *Guichard* against *Roberts*, Mich. 4 Geo. III. In an action on a note of hand, on the trial the defendant gave in evidence, that the note was obtained upon a smuggling consideration; on which the jury found a verdict for him. On a motion for a new trial, lord Mansfield was strongly of opinion, that such evidence should not have been admitted; and took a difference, where the plaintiff alleges the *turpis causa*, [the foul cause], as the cause of his action; and where the defendant sets it up as the ground of his defence: in both which cases, he denied that either party should avail himself of his own wrong, and granted a rule to shew cause. But afterwards in the close of the term, the cause being compromised, lord Mansfield took it up

^a Law of Nisi Prius, 274. Edit. 1785.

^a *Ibid.* 137.

again *mero motu*, or by mere motion; and declared that it was now the clear opinion of the whole court, that on this action an illegal consideration might clearly be set up as a defence; and they did not see why it might not be done on an action of debt on bond: for every creditor ought in justice to prove the consideration on which his contract is founded; and though the law allows bonds and notes to be *primâ facie* evidence of a good consideration, without proving it on the part of the plaintiff, yet it ought not to preclude the defendant from shewing, that the consideration in fact is a bad one.— In our eighth chapter, the subjects whereof are on evidence, in the fifth section thereof is shewn that, where the defendant had promised to pay a bill of exchange, he was allowed to bring evidence, that the debt for which it was due was paid.

§ VI. AS to the effect of notes payable to bearer. In the case of the *Bank of England* against *Newman*, Easter, 11 W. III. the defendant had a note of sixty pounds of one Bellamy, a goldsmith, payable to him or bearer at a day then to come; about a week before which he discounted it at the bank, without indorsing the bill. Bellamy about two months after broke, without having paid the bill; upon which the bank brought *assumpsit* for money lent, and upon this evidence obtained a verdict; but the court granted a new trial, holding it to be a verdict against law; for if the owner of a bill payable to bearer, deliver it for ready money paid down for the same, and not for money antecedently due, or for money lent on the same bill, this is selling the bill like selling of tallies, &c. but if there be an indorsement thereon, the indorsee may have remedy on that indorsement, provided he demand the money in a

* 1 Black. Rep. 445.

convenient time.*—A cash note on a banker, payable to the *ship Fortune* or bearer is a good and negotiable bill of exchange, and the bearer may maintain an action on it in his own name; or he may recover on it in an action for money had and received to his use: but in either case he must prove that he got the bill fairly, and *bonâ fide*; as shewn at large in the sixth section of our sixth chapter.

HENCE appears somewhat of the effect of notes payable to bearer; and here we may observe, that a promissory note payable to A. or bearer, is negotiable without any indorsement; and payment thereof may be demanded by any bearer of it. But in case of a bill of exchange, the payee, or the indorsee, (whether it be a general or particular indorsement) should go to the drawee, and offer his bill for acceptance; and if it be accepted, the drawee then becomes liable; and the payee or indorsee is to use his endeavour to get it paid when due, otherwise he may through negligence lose the whole amount thereof, as shewn in the fourth section of our next preceding chapter; where we have observed, that what has there been said concerning bills of exchange, that are indorsed over, and negotiated from one hand to another, is applicable also to promissory notes. Yet there is no analogy between a bill of exchange and promissory note, whilst the note continues in its original shape; but when it is indorsed the resemblance begins, for then it is an order to pay the money to the indorsee; and this is the very definition of a bill of exchange; therefore the indorsee, before he brings an action against the indorser of a promissory note, ought to demand the money of the drawer; and it must be made on the drawee before an action is brought against the in-

* Law of Nisi Prius, 277, Edit. 1785.

dorser of a bill of exchange, and no inquiry need be made after the drawer; concerning which we shall treat in the first section of our ninth chapter.

BUT there is a distinction between a note payable to B. or order, and to B. or bearer: in the first case, in an action against the indorser, the plaintiff must prove a demand on the drawer, but not in the last; for there the indorser is in nature of an original drawer. In the first case, if the indorsee give credit to the drawer, without notice to the indorser, it will discharge him: so receiving part of the money from the drawer will for ever discharge the indorser; for by such receipt the indorsee has made his election to have his money from the drawer;^b as in the case of *Kellock* against *Robinson*, Hil. 13 Geo. I. where, in an action by the indorsee of a promissory note against the indorser, it appeared the plaintiff had after the indorsement received part of the drawer of the note; and it was held to be a taking upon him to give the whole credit to the drawer of the note, and absolutely discharged the indorser; so the plaintiff was nonsuited.^c

IF the indorser have paid part of the money, that will dispense with proving a demand on the drawer; as in the case of *Vaughan* and *Fuller*, Hil. 19 Geo. II. where, in an action upon a promissory note by the indorsee against the indorser, it was proved that the defendant had paid part of the money. And chief justice Lee held that sufficient to dispense with the proving a demand upon the maker of the note.^d

^b Law of Nisi Prius, 273. *Young*, per Eyre, G. Hall, M. Edit. 1785; cites *Wilmore* and 1 G. II.

^c Str. 745. 1 Wilson Rep. 48.

^d Str. 1246.

IN case the indorsee give credit to the drawer, without notice to the indorser, it will discharge him, as we have just before mentioned; and on holding a note after being dishonoured, we have treated in the third section of our ninth chapter; wherein is a demonstration of the effect of the holder's giving time to the drawer. What is held reasonable notice of non-payment, and that the same must come from the holder. Likewise on what may excuse the giving notice.

§ VII. WITH respect to interest on notes of hand; we may observe, that debts due on those are not of so high a nature as bond debts; and that a note doth not like a bond carry interest from the date or execution thereof, whether interest is mentioned therein or not; but if interest is not mentioned in the note, then it is due only from the time appointed for payment of the note: and if no time is mentioned, and the note is made payable on demand, then from the time of the demand being made.

As to what may be a negotiable note: if a note should not be methodically drawn agreeable to the usual and proper form, it may be a negotiable note within the statute 3 & 4 Ann. provided it be made payable certainly and at all events; as mentioned in the second and third sections of our next preceding chapter.—It is said there are no precise words required to be used either in a bill of exchange or promissory note;^a and as to the latter, if it is within the intent of the act, it is sufficient, though it does not follow the very words of the act. And in the case of *Norris* against *Lee*, Easter, 11 Geo. I. it was held that a note drawn in these

^a 2 Lord Raym. Rep. 1397.

words, *I promise to account with J. S. or his order, for 50l. value received, by me, &c.* was a good negotiable note within this statute, and that the word *account* shall be construed the same as to *pay*, and not to render an account as factor or bailiff; and the rather, because he is not only accountable to J. S. but likewise to his order; which he cannot be as factor or bailiff, and therefore it must be to pay the money to the indorsee, or order of J. S.^b

AND in the case of *Popplewell* against *Wilson*, 6 Geo. I. where a promissory note was entered into by A. to pay so much to B. for a debt due from C. to the said B; and it was objected, that this not being for value received, was not within the statute, and *primâ facie* the debt of another is no consideration to raise a promise. But the court held it to be within the statute, being an absolute promise, and every way as negotiable as if it had been generally for value received.^c

HENCE a conception may be formed of negotiable notes: and now, previous to laying down the forms of such as not only may be negotiable, but that are so indisputably good and negotiable as to be taken with safety in the course of trade, attention being had to the responsibility of the maker and indorsers thereof, and that the note was obtained upon a legal consideration, and not for money won at play, or on a usurious contract; concerning which some hints were dropt in the fifth section of this chapter; we shall proceed to mention, that negotiable notes are most usually drawn payable so many days, weeks, or months after date, as the drawer and payee agree on; and if made payable some weeks after date, the weeks must be re-

^b *Strange*, 629.

^c *Ibid.* 264.

duced into days, counting seven as one week; and on the day next ensuing the date of the note, commences the time of its running. If a note be drawn payable one or two months after date, the day of payment falls on the same day in the succeeding month, &c. from that in which the note was dated, although the months differ in the number of their days.

AND here according to practice, the three days grace are allowed as on bills of exchange; yet it was ruled by justice Denison in the case of *Dexlaux* against *Hood*, 1752, that by law there are not three days grace on promissory notes.⁴ And in the case of *Ward* against *Honeywood*, Hil. 19 Geo. III. justice Buller said he doubted, whether by law three days of grace were to be allowed on promissory notes, though in practice it was usually done,* and the reporter referring to the case of *Dexlaux* against *Hood*, says, "The point, I believe, has never been settled" by a solemn decision. It occurred in a cause of "*Lloyd v. Skutt*, which was tried at the sittings for "Middlesex after M. 20 Geo. III. 30th November, before lord Mansfield." But herein the question was not determined.—In the case of *Tindal and others* against *Brown*, Easter, 26 Geo. III. related in the third section of our ninth chapter, no objection appears to have been made to the three days of grace.

⁴ Law of Nisi Prius, 274. Edit. 1785.

* Doug. Rep. 61. 2 Edit.

THE forms here proposed to be laid down are as follows.

No. I.

LONDON, 3d February, 1788.

Three Weeks^b after Date I promise to pay
to Mr. Aaron Beauchamp, or Order, Forty-five
6d.^a n. Pounds, Value received,

Charles Davis.

Hofier in Fetter-lane^c.

45 £.

Indorsement.

Aaron Beauchamp.^d

^a The stamps required are treated of at large in the second and third sections of our first chapter.

^b This note being made payable three weeks after date, becomes due on the 24th of February, whereto adding the three days grace, the day of payment will be on the 27th.

^c The maker's address to the note does not add to or diminish its validity, but is very necessary, in order to shew where he is to be found, as an indorsee is to demand the money of him before he sues the indorser, and if he gives credit to him he will discharge the indorser, as mentioned in our next preceding section.

^d This is the general method of indorsing on the back of a note, and is commonly termed a blank indorsement; which, as we have hinted in a note under No. I. in the first section of this chapter, is the most safe and proper indorsement.

No. II.

BRISTOL, 7th March, 1788.

Two Months^a after Date I promise to pay
 Mr. Edward Funnerow, or Order, Fifty Pounds,
 1s. ft. Value received,
 George Hand.
 50 £. Linen-draper in Lewin's Mead.

Indorsement [as in No. I.]

No. III.

BATH, 29th May, 1788.

Three Months^b after Date we jointly and se-
 verally^c promise to pay Mr. Lazarus Mullet, or
 1s. ft. Order, Eighty-five Pounds, Value received,
 85 £.
 Noab Olive.
 Philip Querulus.
 Robert Savory.

Indorsement [as in No. I.]

^a This being made payable two months after date, becomes due on the 7th May; and by adding the three days grace, the day of payment will be on the 10th.

^b This being made payable three months after date, becomes due on the 29th August, whereto adding the three days grace, the day of payment will be on the 1st September.

^c Where two or more persons give the note, attention should be had as to their promising jointly and severally; in which case the payee may sue them jointly, or he may sue any one of them at his election; but if they jointly and not severally promise, he must sue them jointly.

CHAP. IV.

- § 1. *Acceptance; same may be either by Writing or Words. The different Effect thereof. Sufficient if Drawee underwrite a Direction to another to pay the Money. May be qualified as to pay Half in Money, &c.*
- § 2. *If a Bill drawn on a Factor, payable out of the Produce of Goods, after discharging prior Acceptances, is accepted by him generally, the same is chargeable on him, notwithstanding any Balance then due to him in a running Account.*
- § 3. *An Agreement to accept may amount to an Acceptance; but if it be to accept on certain Conditions, it is subject thereto.*
- § 4. *Acceptance whether conditional or absolute.*
- § 5. *Indorsee receiving Part from an Acceptor, may discharge the Drawer; but if Part be received from an Acceptor or Indorser, and timely Notice given, it will not discharge the Drawer or other Indorsers.*
- § 6. *Acceptor cannot be discharged without an express Declaration from the Holder.*
- § 7. *If Payee receive Part from the Drawer, Acceptor is not discharged thereby; nor although he suffers several Years to elapse before sue the Acceptor.*
- § 8. *Cautions to Acceptors. Of procuring Acceptance. What to be done if a Bill left for Acceptance be lost; and of sending Bills to procure Acceptance.*
- § 9. *Acceptance if refused, an Action will lie upon the Bill against the Drawer, although the Time of Payment is not come.*
- § 10. *Of Acceptance in Part. To pay at a longer Time than mentioned in the Bill. After the Bill becomes payable.*
- § 11. *Acceptance by Partners; by Drawee's Servant; by a Person for Honor of the Drawer.*

IN the fourth section of our second chapter, we have seen that when a person draws a bill of exchange, and sets his name to it, he becomes answerable

answerable to the payee for the amount thereof, provided the drawee does not pay the bill; which by accepting it he makes himself liable to. And after acceptance he is the original debtor, and the drawer is only liable in his default; and if the acceptor is not called upon within a reasonable time after the bill is become payable, and happens to break, the drawer is not liable at all,* but the loss will fall on the holder of the bill; on which we shall treat in different parts of our ninth chapter; and here proceed to treat on the acceptance under the above mentioned heads.

§ I. ACCEPTANCE may be either by writing or words. If upon tender of the bill to the drawee he subscribes *accepted*, or, accepted by me A. B. or I accept the bill, and will pay it according to the contents; these clearly amount to an acceptance in writing.^b—A small matter amounts to an acceptance, as saying, "Leave the bill with me, and I will accept it;" for it is giving credit to the bill, and hindering the protest; but if the merchant says, "leave the bill with me, and I will look over my account between the drawer and me, and call to-morrow, and accordingly the bill shall be accepted." This is no acceptance, because it depends upon the balance of accounts.^c

In the case of *Lumley against Palmer*, Mich. 8 Geo. II. The defendant was sued as acceptor of an inland bill of exchange, and upon the evidence it appeared to be a parol acceptance only, which the chief justice ruled to be sufficient, as being good at common law: and the statute 3 & 4 Ann. c. 9. which requires it to be in writing, in order to charge

^a 2 Burr. Rep. 674.

^c Law of Nisi Prius, 270. edit. 1785.

^b Molloy, book 2. c. 10.

the drawer with damages and costs, having a proviso that it shall not extend to discharge any remedy that any person may have against the acceptor. Upon this direction, the jury found for the plaintiff: but the chief justice of the common pleas having ruled it otherwise, the court was moved for a new trial, and in order finally to settle this point, it was ordered to be argued; and after argument the court was of opinion, that the direction in the present cause was right, and agreeable to constant practice.^a

IN the case of *Potwel and Moliere* in chancery, 10 Geo. II. before lord Hardwicke. A bill was for satisfaction of a bill of exchange, drawn upon the defendant, and accepted by him. Pending the suit, the original defendant died, and it was revived against his executors; praying also a discovery of assets, and to be satisfied thereout. On the proofs it being questioned, whether the acceptance was sufficient to charge the defendant, and whether the plaintiff by keeping the note above ten days after it became due, without coming to the drawer for the money, had not discharged the acceptor; but it was insisted for the defendant as a previous matter, that the plaintiff had a plain remedy at law, and that his case depended on facts that ought to be tried by a jury, and not be determined in this court. By lord Hardwicke: Regularly the plaintiff ought to pursue his remedy at law, and not in this court; and if the case stood as it did at first, I should certainly dismiss the bill; but the bill of revivor, praying a satisfaction out of assets, and a discovery of assets, it is made a case of which this court takes cognizance, and then the prayer of satisfaction is an incident that follows with it.

^a Strange, 1000.

I have therefore no doubt but the plaintiff is proper in praying a remedy in this court. But with regard to the acceptance, if there were a doubt of it, as to the fact, or whether in law what has been done amounts to an acceptance, it may still be necessary to send the parties to a trial at law; but I think there is no doubt of either. The testator, when the bill was brought to him, received it, entered it in his book, according to the course of trade, and the entry is proved to have been made under a particular number, and wrote that number under the bill, and returned it. Now it is said to be the custom of merchants, that if a man underwrite any thing to a bill, it amounts to an acceptance. But if there were no more than this in the case, I should think it of little avail to charge the defendant; but what determines me is the testator's letters; and I think there can be no doubt but that an acceptance may be by letter, and it has been so determined. There was a doubt whether a parol acceptance be good, as in the case of *Lumley and Palmer*, [the next preceding case] and I had a case made of it for the opinion of the court; and it was several times argued, and at last solemnly determined, that such acceptance is good; much more therefore an acceptance by letter. As to the plaintiff's being entitled to interest, I think it a clear case that he is, though no protest has been made, for that it is necessary only to entitle the payee to damages against the drawer; and all the damage that can be had in such a case is the interest; and the decree was for the defendant to pay the bill of exchange with interest at the rate of four *per cent.*; the plaintiff to pay the costs to the time of the bill of revivor; and after each party to bear their own costs.—The construction of the statute 3 & 4 Ann. is, that to charge the drawer with interest and costs,

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the drawee must refuse to accept in writing; whereon protest may be made, as shewn, with the use and effect thereof, in our fifth chapter.

SUFFICIENT acceptance if drawee underwrite a direction to another to pay the money, as in the case of *Moor* against *Whitby*, Trin. 10 Geo. III. A bill was drawn as follows, "To Mr. R. Whitby, Sir, please to pay Mr. Scot, or order, 30l. The Newton." Scot indorsed it to the plaintiff, who presented the bill to the drawee for acceptance, and the defendant (the drawee) underwrites thus:—"Mr. Jackson, please to pay this note, and charge it to Mr. Newton's account. R. Whitby." It was insisted that this was no acceptance, for the defendant did not mean to become the principal debtor. It was only a direction to Jackson, to pay 30l. out of a particular fund; and if there were no such fund, the money was not to be paid. But, by the court: The underwriting is a direction to Jackson to pay the sum; and it signifies not to what account it is to be placed when paid; that is a transaction between them two only; and this is clearly a sufficient acceptance.

An acceptance may be qualified, as to pay half in money and half in bills. So to pay when goods sent by the drawer are sold. But he to whom the bill is due may refuse such acceptance and protest the bill, so as to charge the drawer. And a bill may be accepted as for part of the sum drawn for, but such acceptance may be refused, as mentioned here, after in our tenth section.

§ II. IF a bill drawn on a factor, payable out of the produce of goods, after discharging prior ac-

* 6 Mod. 80, 81.

b Law of Nisi Prius, 270. Edit. 1785.

c Ibid.

ceptances,

ceptances, is accepted by him generally, the same is chargeable on him; notwithstanding any balance then due to him in a running account with his principal; as in the case of *Maber* against *Massias*, Easter, 16 Geo. III. wherein a verdict having been given for the plaintiff, with 195*l.* damages. On a new trial being moved for, chief justice De Grey reported, that William Watts, a merchant, who traded to Gibraltar, employed the defendant, Massias, as his factor there, who used to consign Watts's goods to certain agents in Barbary for sale. Massias used to keep an account with the agents, and another with Watts; but Watts had no communication with the agents. On the 21st of May, 1772, Watts drew on Massias a bill in the following terms, for balance of an account that day stated between Watts and the plaintiffs, being merchants, with whom he had dealings, *viz.* "Sir, please to
 " pay to Messrs. Maber and Kentish or order
 " 195*l.* 14*s.* 10*d.* out of the produce of goods
 " you have of mine, now lying at Gibraltar, Bar-
 " bary, and Leghorn, as soon as the same shall
 " come into your hands, after discharging the pre-
 " sent acceptances.

" To Mr. Moses Massias.

" William Watts."

No. 63,

" Prescot-Street."

Which bill Massias accepted in the following words under written thereto.

" I agree to conform to this order, *Moses Massias.*"

BEFORE any payment on this bill Watts became a bankrupt, and on Massias's refusing payment, this action was brought for money had and received to the plaintiff's use; and on the trial, gave evidence that Massias had, in 1772 and in 1773, large quan-

ties of Watts's goods in his hands, to the amount of 1657 l. in 1773, and more in 1772. And that he had paid large sums for Watts; but whether for engagements, prior to 1772 or not, did not appear. The defendant gave evidence of divers prior engagements, which did not cover the whole account; and also that there is, and was at the time of the acceptance, a balance due to Massias himself of 870 l.

ADAIR, counsel for the plaintiff, having shewed cause why there should not be a new trial.—By the court (chief justice De Grey, Gould, Blackstone, and Nares, justices): The question is, Whether the defendant had in his hands 195 l. for the use of the plaintiff? He is proved to have had goods to the amount of 1657 l. and that his acceptances, in the common and technical sense of the words, as applied to bills of exchange, together with certain other indorsements, by which he had engaged himself to pay money for Watts, left a balance in his hands more than sufficient to pay the plaintiff; if we exclude the balance of 870 l. due to Massias himself. This balance, then unliquidated, could never be meant to be provided for; nor was the bill or its acceptance meant to be subject to it. For then there would have been fraud in the drawer, and also in the acceptor; for both knew, or must be supposed to know, at least Massias knew, how the balance then stood. If he meant to have reserved his own balance, he should have made a special acceptance. But having accepted it generally in the terms of the draft, that is, subject only to prior acceptances, he shall not shelter himself by this concealed balance due to himself in the course of a running account.* Hereon the rule for shewing cause why there should not be a new trial was discharged.

* 2 Black. Rep. 1072.

§ III. AN agreement to accept may amount to an acceptance; but if it be to accept on certain conditions, it is subject thereto; as by Lord Mansfield, in delivering the opinion of the court of King's Bench in the case of *Mason* against *Hunt* and another, Mich. 20 Geo. III. wherein after verdict, a rule for a new trial being obtained, it was contended that an agreement contained in a letter, on which the plaintiff relied as a virtual acceptance, was only conditional, qualified by a contingency; which being argued by counsel on the other side; the opinion of the court was delivered by Lord Mansfield; when his lordship, stating the defence made at the trial, says, there is no doubt but an agreement to accept may amount to an acceptance, and it may be couched in such words as to put a third person in a better condition than the drawer. If one man to give credit to another makes an absolute promise to accept his bill, the drawer or any other person may shew such promise upon the exchange, to get credit; and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor. But an agreement to accept is still but an agreement, and if it is conditional, and a third person takes the bill, knowing of the conditions annexed to the agreement, he takes it subject to such conditions.^b —An agreement to accept a bill on certain conditions is discharged, if the conditions are not complied with.—If there is a *virtual* acceptance, on consideration that goods shall be consigned to the acceptor, to answer the bill, together with a policy of insurance upon them, the holder of the bill, by taking to the goods and selling them, discharges the acceptance.^c

^b Doug. Rep. 297. 2 Edit.

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^c *Ibid.*

§ IV. AC-

§ IV. ACCEPTANCE, whether conditional or absolute? Where a bill of exchange was drawn upon A. residing in London, by a consigner of goods living abroad; on its being presented for acceptance, A. said he could not then accept, because he did not know whether the ship would arrive at London or Bristol. B. the holder of the bill, agreed to leave it for some time, reserving the liberty of protesting it for non-acceptance, in case A. did not accept. On a second application, A. said, the bill would be paid *even if the ship were lost*. This is only a conditional acceptance, depending on two events, of the ship's arriving at London or being lost. And B. having the liberty of refusing such conditional acceptance, precludes himself from recovering against A. by afterwards noting the bill for non-acceptance. Whether conditional or absolute acceptance, is a question of law.

THOSE were the resolutions on the case of *Sproat* against *Matthews*, Easter, 26 Geo. III. which case was argued on shewing cause why a nonsuit entered herein at the last sitting at Guildhall should not be set aside and a new trial granted. The facts, as they appeared by the report, were as follows. This was an action brought by an indorsee of a bill of exchange against the acceptor. The bill was drawn on the defendant, and made payable forty days after sight to one Lenox or order: Allen, the plaintiff's clerk, swore, that on the 24th of September, 1785, he presented the bill to the defendant, who lived in London, for acceptance; who told him, "that the drawer had consigned a ship and cargo to him and another person at Bristol, but as he could not then tell whether the ship would arrive at London or Bristol, he could not accept at that time." Upon which Allen said, that he would leave the bill upon
this

this condition, that in the event of the defendant's not accepting it from the day when it was presented, he would be at liberty to note it for non-acceptance as from that time. To this the defendant assented, and the bill was accordingly left at his house till the 8th of October, when Allen called again, in company with the plaintiff, to know whether the defendant would accept the bill or not: who, on being pressed to accept, said, "the bill was a good one, and that it would be paid, even if the ship were lost." Allen, immediately upon this, carried the bill to a notary public, and had it noted for non-acceptance from the time it was first left with the defendant. The ship afterwards arrived safe at the port of London, and the cargo was disposed of by the defendant.

Justice Buller, who tried this cause, being of opinion that this amounted only to a conditional acceptance, which the plaintiff was at liberty to refuse or not as he chose; and that his noting the bill immediately after the second conversation, shewed that he was not satisfied with such conditional acceptance, nonsuited the plaintiff.

The motion for setting aside this nonsuit was made on two grounds; 1st. That this must be considered as an absolute acceptance; 2dly. That if it were a conditional one, it should have been left to the jury to consider, whether the plaintiff had precluded himself by his subsequent conduct from recovering against the acceptor.

After the counsel on each side had closed their arguments hereon, Lord Mansfield being absent, the other judges delivered their separate opinions as follows.

JUSTICE WILLES: Whether this nonsuit was right or not depends on two questions; 1st. Whether this was an absolute or conditional acceptance? In determining which, we must consider the two conversations between Allen and the defendant together. When the bill was first presented to the defendant for acceptance, he said, he could not accept at that time, because he did not know whether the ship would come to London or not. The reason of this answer is obvious, because if the ship arrived at Bristol, she was consigned to another person. Then in a subsequent conversation, he said, "the bill will be paid, even if the ship be lost." So that he accepted on two conditions; namely, the one, if the ship came to London, in which case he would be enabled to pay himself with the profits of the cargo; the other, in case the ship was lost, when he would have wherewithal to satisfy the bill, he having a policy of insurance on the ship in his hands; but he did not accept in the third instance, which was in the event of the ship's going to Bristol.—The court has not of late been very nice with regard to what shall be construed to be an acceptance. For though formerly it was held necessary that an acceptance should be in writing, yet of late years a parol acceptance has been deemed sufficient. And indeed at present almost any thing amounts to an acceptance. Therefore if there were a doubt whether this was a conditional or an absolute acceptance, or whether (admitting it to be a conditional one only) the party had precluded himself by his subsequent conduct, the whole of the facts should have been left to the jury. So that I am of opinion that the nonsuit ought to be set aside.

JUSTICE ASHHURST: I do not concur with my brother Willes, that this nonsuit ought to be set aside.

afide. In the case of a written acceptance, the acceptance speaks for itself. But this being a parol acceptance, the conduct of the plaintiff is decisive against him. And the *evidentia rei* [evidence of the matter] shews that he put the right construction on this transaction, by procuring the bill to be noted. On the first conversation, the defendant expressed a doubt, whether the ship would come to London or to Bristol; if to London, he would have had effects in his hands to indemnify himself, because the cargo was consigned to him; if to Bristol, it was consigned to another person. Then it was agreed between the parties that the bill should be left with the defendant, with liberty to the plaintiff to note it as from the first tender of the bill, in case the defendant should not eventually accept. On the second conversation, the defendant is represented to have said, "the bill will be paid, even if the ship be lost." The witness might have varied this phrase. But at all events this only amounted to a conditional acceptance, in case the ship arrived at London or was lost; which the plaintiff afterwards waived. If the party had conceived it to be an acceptance, he should have required that to be signified on the bill itself. Then it was said that the reason why the bill was noted, was to mark the time from which it was to be considered as accepted; but that might have been better effected on the bill, by accepting it as from that day. Then it is manifest that the parties understood at the time, that the matter was left unconcluded. If so, the plaintiff is absolutely bound by his subsequent act; for he protested the bill for non-acceptance; therefore there could be nothing to leave to a jury.

JUSTICE BULLER: We are now to determine on a point of law, which is decisive that this question ought not to have been left to the jury. Whatever may

may have been the doubts formerly of what amounted to an acceptance, I conceive it is the sole province of the court to decide, whether this is an absolute or a conditional acceptance. This case was proved by one witness on the part of the plaintiff; the defendant's counsel admitted this evidence to be true, but insisted that upon that evidence the defendant was not liable in point of law. Then there was nothing to be left to the jury. If the defendant had objected at the trial that the plaintiff's witness might be mistaken in his expressions, that might properly have been left to the jury, who are to decide on the credit or accuracy of a witness. Then supposing these facts had been stated on a special verdict, the court would have been bound to determine whether this, in point of law, was an acceptance or not. And this brings it to the true question before us, namely, whether this is a conditional or an absolute acceptance? There is no ground for saying it was an absolute one. It was not thought of at the trial, and the words of the defendant preclude every idea of it. Taking both the conversations together, it is decisive against the plaintiff. At the first conversation the defendant said, I do not know whether the ship will come to London, and therefore I cannot accept at present. At that time then he only intended to accept in the event of the ship's coming to London; at the second, he said, "the bill will be paid even if the ship be lost;" both the conversations therefore amount to this, that there were two events, in which the bill would be paid, the one, if the ship came to London, the other if she were lost. It is evident from what passed, that the defendant did not intend to accept, unless he had wherewithal in his hands to reimburse himself. If the ship came to London he had the disposal of the cargo; if she were lost, he was in possession of the policy. This therefore was a conditional acceptance;

tance; and in these cases the holder may choose whether he will be satisfied with it or not; but here the plaintiff has waived it by protesting the bill for non-acceptance. And his reason for noting it for non-acceptance, as from the first day, was, that he might proceed against the drawer for interest for a longer time. Hereon the rule was discharged, and the nonsuit of the plaintiff at the before-mentioned trial confirmed.

§ V. IF the indorsee accept any part of the money from the acceptor, he cannot afterwards resort to the drawer for the remainder of the money, unless he give timely notice to the drawer that the bill is not duly paid: For where a man takes part of the money only, and does not apprise the drawer that the whole is not paid, he gives a new credit for the remainder. But where timely notice is given that the bill is not duly paid, the receiving part of the money from an acceptor or indorser, will not discharge the drawer or other indorsers. For it is for their advantage that as much should be received from others as may be.^b

§ VI. ACCEPTOR cannot be discharged without an express declaration from the holder; as held in the case of *Dingwall* against *Dunster*, Mich. 20 Geo. III. The plaintiff as indorsee of a bill of exchange for 400l. dated 10th July, 1774, and payable in five months, brought an action of *assumpsit* against the defendant, as acceptor; and the cause came on to be tried before Lord Mansfield, at the last sittings for Middlesex, when two sorts of defence were set up. 1. That the bill was given for money won at play. 2. That the plaintiff by his conduct,

^a Durnford and East, Rep. 182.

^b Law of Nisi Prius, 271, Edif. 1783. Cites Johnson, v. Kenyon, C. B. Hil. 5 Geo. III. though

though not in express terms, had agreed to discharge the acceptor, and seek his remedy only against the drawer.

To prove that the money was won at play, the defendant's counsel called the drawer, (one Wheate) who had been discharged under an insolvent debtor's act; but as his future effects still remained liable to the debt, his lordship rejected him, as an inadmissible witness; and the cause went to the jury on the other question.^c They found for the defendant; upon which the plaintiff obtained a rule to shew cause why there should not be a new trial, which now came on to be argued. The most material facts of the case were as follows: The bill was accepted by the defendant merely to lend his credit, and accommodate the drawer. Fitzgerald, the payee, indorsed it to the plaintiff, and delivered it to him in payment for jewels. After it became due, the plaintiff, understanding that the acceptor never had any consideration for accepting it, and that Wheate was the real debtor, wrote to one Ready, (Wheate's attorney) on the 6th of February, and on the 4th of November, 1775, pressing him for the payment.—Dunster on the 13th of February, 1775, wrote a letter to Dingwall, thanking him in strong terms for not proceeding against him, but mentioning in the same letter, that he had been informed by a person who had been sent from him to Dingwall on the business, that Wheate had taken up the bill, and given another to Dingwall's satisfaction. It did not appear that Dingwall took any notice of that letter. Dingwall for some time received interest upon this bill from Wheate, and also the principal due by another

^c If it had been proved, that the bill was for money won at play, it would have been void in the hands of the plaintiff, though

an innocent indorsee for valuable consideration; as shewn in our seventh chapter.

bill which was made at the same time, and drawn and accepted by the same parties, and under like circumstances. The plaintiff suffered several years to elapse without calling upon Dunster, or treating him as his debtor.

THE counsel hereon having closed their arguments, in which was cited the cases of *Black* against *Peele*, and *Walpole* against *Pultney*; the judges delivered their separate opinions.

LORD MANSFIELD: There is no doubt but a holder of a bill may discharge any of the parties, but there is this difference between the acceptor and the others, that the acceptor is first liable, and, to be intitled to have recourse against him, it is not necessary to shew notice, given to him of non-payment by any other person. In the present case the question is, whether any thing has in fact been done to discharge the defendant. The plaintiff being apprized that Wheate was the person for whose benefit the bill was drawn, did right in considering him as his debtor, and recurring to him for payment. The defendant was sensible of his kindness in not resorting to him in the first instance, and wrote to thank him for it. No use was made at the trial, nor on the present argument, of what might have been a material circumstance, viz. the defendant's having written to the plaintiff, that he had been informed by a person who had been sent from him to the plaintiff to talk with him about the bill, that it had been delivered up to Wheate. Probably the fact did not warrant him in this assertion. If the plaintiff, by any thing in his conduct, had confirmed him in such a belief, it might have altered the case; but nothing of that sort appears. I think there is no ground to say he was discharged.

JUSTICE

JUSTICE WILLES : I am of the same opinion. I do not think silence can discharge the acceptor. No case of a tacit discharge has been produced. In *Black v. Peele*, the discharge was in express words. In *Walpole v. Pultney*, the case was put upon the entry in the book being an express discharge. Besides that case is still depending.

JUSTICE ASHHURST : I am of the same opinion. An acceptor makes himself the debtor, and his case is different to that of the other parties to the bill. Nothing but an express discharge will do. The defendant endeavours to prove a discharge from letters, but they do not come up to it, and the conduct of the plaintiff amounts only to indulgence towards the acceptor.

JUSTICE BULLER : I am clearly of the same opinion. Nothing but an express agreement can discharge an acceptor. And nothing of that sort appears in this case. The plaintiff's conduct meant nothing more, but that he would try to recover from the drawer, who was the original and true debtor, if he could.—Hereon the rule was made absolute.*

§ VII. IF payee receive part from the drawer, acceptor is not discharged thereby; nor although he suffer several years to elapse before sue the acceptor. In the case of *Ellis against Galindo*, Mich. 24 Geo. III. in which an action of *assumpsit* was brought by the payee of a bill of exchange, for 30l. against the acceptor. The drawer and acceptor were brothers. When the bill became due, the plaintiff received of the drawer 3l. 15s. 4d. and at the same

* Doug. Rep. 274. 2 Edit.

me, the following indorsement was made on the bill, viz. "Received on account of this bill 3l. 15s. 4d. Balance remaining 26l. 4s. 8d. I promise to pay to Mr. Thomas Ellis, within three months from the date of this." Signed by James Galindo, who was the drawer. The balance was never paid, and at the distance of three years this action was brought against the acceptor. The cause was tried before Lord Mansfield, who thought the acceptor was discharged, and nonsuited the plaintiff.

BUT a rule being obtained to shew cause why there should not be a new trial, it was contended for the plaintiff by the solicitor general (Lee), and Baldwin, that the indulgence for three months could no more be held to amount to a discharge, than the payment of part, and that it was clear law, that payment of part by the drawer would not discharge the acceptor. An acceptor and drawer stand in different situations. The indorsement was made to prevent an imputation of laches, because delay in coming against an acceptor, may discharge a drawer or indorser. But nothing under the limitation of six years will discharge the acceptor.

BY LORD MANSFIELD: The doubt is, whether, instead of a nonsuit the question should not have been left to the jury, it being a question of intention arising out of the circumstances. The bill was probably an accommodation bill, as the drawer and acceptor were brothers.—Justice Willes: It was established by *Dingwall* against *Dunster* [the case in the next preceding section], that *laches* [negligence] will not discharge the acceptor. My doubt is, how far this indorsement necessarily discharges the acceptor, and I think that question ought to have been left to the jury.—Justice Buller: There is no doubt as to the law. It is as has been stated by the counsel

counsel for the plaintiff. I rather think the case should have gone to the jury. But I am not, therefore, of opinion that there should be a new trial. The indorsement could not have been meant as an additional security, for the drawer was equally liable before. I should have left the question to the jury, but with very strong observations; and as the demand is so small, I do not think there should be a new trial.—Hereon the rule was discharged. ^b

§ VIII. CAUTIONS to acceptors in various instances, appearing so conspicuous from what has been treated on under the foregoing heads of this chapter, we need here only mention that if drawee has heard that a drawer is failed, he ought not to accept any of his drafts afterwards; as his so doing may either prejudice himself, or a third person, which he should carefully avoid, and not engage without a sufficient security against all claims and demands, that may be made either by the drawer himself, or any other in his right. For a bill once accepted cannot be revoked by the party that accepted it, though immediately after, and before the bill becomes due, he hath advice that the drawer is broke.

WHEN a bill of exchange is drawn, the payee or indorsee should go or send to the drawee, and offer the bill for acceptance; as we have mentioned in the fourth section of our second chapter, and in the third section of our fifth, that the drawee must (unless dead or not to be found) be desired to accept the bill before there can be a protest for non-acceptance. And this being the case, the bill soon after it is drawn, is usually presented by the payee or indorsee (if it be indorsed) his agent, friend, or servant, to

^b Doug. Rep. 250. 2 Edit.

the drawee for him to accept; though an indorsee is not obliged to present the bill for acceptance before it becomes due; as shewn in the fifth section of our ninth chapter.

IF the bill is sent up to London, it is customary for the possessor thereof to carry or send it (on receipt, or as soon as possible after it is received) to the merchant or banker's house, on whom it is drawn; for acceptance, and leave it there (if desired) till the next day, except the post goes out the same day it is received (which often happens from the unavoidable irregularity of its arrival) in which case it is said, the bill should be accepted or protested;^c which acceptance should be in writing, whereof mention is made in our second chapter, section the fourth, paragraph the fourth, and in the first section of this chapter. But as to the exception of the post's going out, it seems according to the custom of merchants, the party on whom the bill is drawn may have twenty-four hours to consider whether he will accept it or not.^d—If a bill be drawn on two, who are not in partnership, in order to bind both, a joint acceptance is necessary, as shewn hereafter in our eleventh section.

WHEN a bill of exchange is drawn and delivered to the payee, it is prudent for him to take an exact copy thereof before the bill is left for acceptance; and the person who leaves it (if he has not an exact copy) should have the principal contents of the bill, viz. the number (if it be numbered,) date, drawer's name, sum drawn for, when payable, and to whom; minuted down in writing, whereby he may be sure to identify the bill when he calls for it.—If a bill, when left for acceptance, be lost, he to whom it is

^c *Lex Mercatoria Rediviva*, 454.

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^d Marius, 62.

payable

payable is to request the drawee to give him a note for the payment according to the time limited in the bill; otherwise there must be two protests, one for non-payment, the other for non-acceptance.*—In this case of the bill being lost, the drawee, if he intended to accept, should give a note under his hand for the payment of the sum mentioned in the bill to the payee, or to his order upon delivery of the second, if it come in time, or if not, upon that note, which is in all respects and cases to have the law privilege of a bill of exchange. If such note be refused, protest should be immediately made for non-acceptance, and forwarded to the drawer or remitter; as that for non-payment should be (though there is neither bill nor note to demand it on) if the contents of the lost bill are not satisfied at the time limited for payment.†

If A. write his name on the back of a bill, and send it to J. S. to get it accepted, which is done accordingly, A. may notwithstanding, bring an action against the acceptor, for J. S. has it in his power to act either as servant or assignee; for he may witness his election by filling up the blank over the name to receive it as indorsee, or by omitting it act only as servant.‡—Where a person has bills sent to him to procure their acceptance, with directions to return them or hold them at the orders of the seconds, &c. and he to whom they are so sent either forgets or neglects to demand acceptance, or if he suffers the party on whom they are drawn to delay their acceptance, and the drawers in the interim fail; this will not subject him to a payment of their value; but, it is said, if he be urged and pressed to procure acceptance and payment to a bill sent him,

* Law of Nisi Prius, 271, Edit. ‡ Law of Nisi Prius, 271.

1785.

† *Lex Mercatoria Rediviva*, 454.

and should protract, or refer the getting it done, and the acceptant, being ignorant of the drawer's circumstances, declares he would have accepted it, had it been timely presented, the person guilty of this neglect will be obliged to make good the loss, that has happened to his correspondent purely through his omission and carelessness.^b

§ IX. ACCEPTANCE if refused, an action will lie upon the bill against the drawer, before the time when it is made payable; as in the case of *Milford* against *Mayor*, Hil. 19 Geo. III. On a rule to shew cause why the defendant should not be discharged. The ground was, that by the affidavit on which he was held to bail, it was sworn, "that he" "was indebted to the plaintiff as indorsee of a bill" "of exchange," but that the bill in fact was not yet due. The defendant was the drawer of the bill, and the drawee had refused to accept it.—By justice Buller: It is settled, that, if a bill of exchange is not accepted, an action on the bill will lie immediately against the drawer, although the time of payment is not come. This I remember to have been determined in the year 1765, in a cause in which Sir Fletcher Norton was counsel for the defendant.^c The reason is this, as lord Mansfield said in that case, that what the drawer had undertaken has not been performed, the drawee not having given him the credit which was the ground of the contract. There have been a great many actions of the same sort since that time.—Justice Willes and Ashurst, being of the same opinion with justice Buller, (lord Mansfield absent) the rule was discharged.^a

^b *Lex. Mercatoria Rediviva*, 454. ^a Doug. Rep. 55. 2 Edit.

^c *Bright v. Purrier*, Law of Nisi Prius, 269, Edit. 1785.

§ X. AS a person when drawn on may totally refuse acceptance, he may accept the bill in part; but the payee may refuse such acceptance, and protest it, so as to charge the drawer. And it is said, that after such acceptance, and refusal of payment, he hath the same liberty of charging the drawer, that he had in case the bill had been accepted absolutely, and payment refused.^b A bill may be accepted for part, where the party upon whom drawn hath no more effects in his hands; which is usually done; and in such case there may be a protest immediately for the residue, or, after payment of the part there must be a protest for the remainder. An acceptance to pay less than is mentioned in the bill is good for so much against the acceptor.^c

AN acceptance may be to pay at a longer time than mentioned in the bill.—In the case of *Price and Shute*, Easter, 33 Car. II. where a bill was drawn payable the first of January; the person upon whom the same was drawn, accepts it to be paid the first of March; the servant brings back the bill. The master, perceiving this large acceptance, strikes out the first of March, and puts in the first of January, and then sends the bill to be paid. The acceptor then refuses. Whereupon the person to whom the moneys were to be paid, strikes out the first of January, and puts in the first of March again. On an action brought on this bill, the question was, Whether these alterations did not destroy the bill? and it was ruled they did not.^d

WHERE a bill was drawn payable such a day, and the drawee accepted it some time after, it was hold the acceptor was liable to the payment thereof.^e

^b 3 New Abr. 611,
^c Strangs, 214.

^d Molloy, b. 2, c. 10, sect. 28.
^e 1 Salk, 127.

And in the case of *Mutford* against *Walcot*, 1 W. III. where acceptance was after the day of payment. By chief justice Holt: Acceptance after the day of payment is common, and there is no inconveniency in it.^f

If a bill is not accepted, to be paid at the exact time, it must be protested; but if accepted for a longer time, the party to whom a bill is made payable, must protest the same for want of acceptance, according to the tenor; yet he may take the acceptance offered notwithstanding. Nor can the acceptor, if he once subscribes the bill for a longer time, revoke the same or blot out his name, although it is not according to the tenor of the bill; for by his acceptance, he hath made himself debtor, and owns the draft made by his friend upon him, whose right another man cannot give away, and therefore cannot refuse or discharge the acceptance. — This case will admit of two protests, perhaps three. 1. One protest must be made for not accepting according to the time. 2. For that the money being demanded according to the time mentioned in the bill, was not paid. 3. If the money is not paid according to the time the acceptor subscribed or accepted.^g

§ XI. AS to acceptance by partners. In the case of *Pinkney* against *Hall*, 8 W. III. it was held, that if a bill be drawn on one person only, the payee, he to whom the bill is made payable, must regularly resort to the drawee, and desire him to accept; and if drawn on two, it must regularly have a joint acceptance; but by the custom of England, where there are two joint traders, and one accepts a bill drawn on both for him and partner, it binds both,

^f Ld. Raym. 574.

^g *Lex Mercatoria Rediviva*, 481.

if it concerns the joint trade; otherwise if it concerns the acceptor only in a distinct interest and respect;^b whereof mention is again made in the fifth section of our sixth chapter.—If ten merchants employ one factor, and he draw a bill upon them all, and one accept it, this shall only bind him and not the rest.^c

WHERE a book-keeper, or servant, or other person, having authority, or usually transacting business of this nature for the master, accepts a bill of exchange, this shall bind such master.*

IN the case of *Thomas against Bishop*, Mich. 7 Geo. II. where the plaintiff was indorsee of a bill of exchange, drawn from Scotland, upon the defendant, in these words, “At thirty days sight pay to J. S. or order 200l. value received of him, and place the same to the account of the York-buildings company, *per* advice from Charles Mildway. To Mr. Humphry Bishop, cashier of the York-buildings company, at their house, in Winchester-Street, London. Accepted 13th June, 1732, *per* H. Bishop.” The bill not being paid, an action was brought against the defendant on his acceptance. And the defendant proved that the letter of advice was addressed to the company; and that the bill being brought to their house, he was ordered to accept it, which he did in the same manner as he had accepted other bills. But Mr. justice Page, who tried the cause, directed the jury to find for the plaintiff, which they did accordingly.

AND upon a motion for a new trial, the court held this direction to be right. For the bill, upon

^b 1 Salk. 126. *Ld. Raym.* 175.

^c 3 New Abr. 611.

^{*} Law of Nisi Prius, 270.

the face of it, imports to be drawn upon the defendant, and it is accepted by him generally, and not as servant to the company, to whose account he had no right to charge it, till actual payment by himself. And this being an action by an indorsee, it would be of dangerous consequence to trade, to admit of evidence arising from such extrinsic circumstances, as the letter of advice. And they said, this differed widely from the case of a bill addressed to the master, and underwrote by the servant; where undoubtedly the servant would not be liable, but his acceptance would be considered as the act of the master. A bill of exchange is a contract by the custom of merchants, and the whole of that contract must appear in writing. Now here is nothing in writing to bind the company, nor can any action be maintained against them upon the bill; for the addition of cashier to the defendant's name is only to denote the person with more certainty, and the York-buildings house is only to inform the order where the drawee is to be found; and the direction, whose account to place it to, is for the use of the drawee only. And they compared it to the case of *Carth. 5. 2 Ven. 307.* where a bill was drawn payable to Price for the use of *Calvert*, and held that the legal property was in Price, which is stronger than the present case. They said, it might be otherwise if the action had been by J. S. who was privy to the transaction, and it had appeared he tendered the bill as a bill on the company. But this plaintiff being a stranger, they could not consider those circumstances.—The plaintiff had judgment.^a

ACCEPTANCE by a person for the honor of the drawer, is held to be binding;^b whereof mention

^a *Strange*, 955.

^b *Ld. Raym.* 574. 1 *Salk.* 129.

will again be made towards the end of the third section, in our tenth chapter.—If a bill be drawn on J. S. and he refuses to accept it, or if he be out of town, and has left no order or authority to accept bills; and that A. B. will accept the bill for the honor of the drawer; in either of these cases the party to whom the said bill is payable, or his assigns, the indorsees, ought in the first place to cause protest to be made for non-acceptance by J. S. and he may take the acceptance of A. B. for the honor of the drawer; for otherwise the drawer may alledge that he did not draw the bill on A. B. but on J. S. and therefore according to the custom of merchants, diligence ought to be used towards J. S. and by protest to prove his want of acceptance.^c—If A. draw a bill on B. and B. living in the country, C. his friend accept it, the bill must not be protested for non-acceptance of B. and then C's. acceptance shall bind him to answer the money.^d

• Marius, 88.—Acceptance for honor is usually made in those or like words. “I the underwritten do bind myself as principal according to the custom of merchants, for the

“ sum mentioned in the bill of
“ exchange whereupon protest
“ is made, &c.

^d Law of Nisi Prius, 271, Edit. 1785.

C H A P. V.

- § 1. *Of the Protest; by whom to be made; its Use and Effect.*
 § 2. *Its Use and Effect as to Foreign Bills. The Use of noting; and Expence thereof.*
 § 3. *When and on what Occasions the Protest is to be made; and of giving the Drawer, or Indorser Notice of Non-acceptance, or Non-payment. Of Protest for better Security.*
 § 4. *Party to whom a Bill is payable shall not make Use of the second Bill of Exchange to charge the Drawer, when the first Bill was accepted, and he staid beyond the usual Time, and did not protest the first Bill for Non-payment.*

AS in the fourth section of our second chapter we have mentioned that the payee or indorsee of a bill of exchange, is to go or send to the drawee and offer it for acceptance; and that if the drawee refuse to accept the same, and it be of the value of 20l. or upward, and expressed to be for value received; the payee or indorsee may protest it for non-acceptance; and notice thereof must be given the drawer or indorser. And in case the bill be accepted by the drawee, and after acceptance he fails or refuses to pay the same within three days after it becomes due; the payee or indorsee is then to get it protested for non-payment, notice whereof must likewise be given the drawer or indorser. And as the subjects of our next preceding chapter have been on acceptances, wherein mention of protest hath occasionally been made; we shall here first treat on the protest as ordained by the statutes 9 & 10 W. III. and 3 & 4 Ann. and then from the determinations

minations of the courts had thereon shew the use and effect thereof. In our second section treat on the use and effect of the protest as to foreign bills. The use of noting; and from thence proceed with the propositions of our third section; as concerning when and on what occasions the protest is to be made, and the notice to be given the drawer or indorser of non-acceptance or non-payment. And conclude the chapter with our fourth section.

§ I. AT common law this difference subsisted between foreign and inland bills, that there was no custom of protesting the latter, so as to subject the drawer to interest and damages in case of non-payment, as there was on the former; to remedy this inconvenience the statute 9 & 10 W. III. c. 17. and afterwards the 3 & 4 Ann. c. 9. were made, which statutes we shall now proceed to take a view of.

By statute 9 & 10 W. III. after reciting that great damages and other inconveniencies frequently happen in the course of trade and commerce, by reason of delays of payment and other neglects on inland bills of exchange; it is enacted, " that all
 " and every bill or bills of exchange drawn in or
 " dated at and from any trading city, town, or any
 " other place in the kingdom of England, dominion
 " of Wales, or town of Berwick upon Tweed, of
 " the sum of 5l. or upwards, upon any person or
 " persons of or in London, or any other trading
 " city or town, or any other place (in which said
 " bill or bills of exchange shall be acknowledged,
 " and expressed the said value to be received) and
 " is and shall be drawn payable at a certain number
 " of days, weeks, or months after date thereof;
 " that, from and after presentation and acceptance,
 " of the said bill or bills of exchange; (which ac-
 " ceptance

" acceptance shall be by the under-writing the same
 " under the parties hand so accepting) and after the
 " expiration of three days after the said bill or bills
 " shall become due, the party to whom the same
 " are made payable, his servant, agent, or assigns,
 " may and shall cause the said bill or bills to be
 " protested by a notary public, and in default of
 " such notary pulic, by any other substantial person
 " of the city, town or place, in the presence of
 " two or more credible witnesses ; refusal or neg-
 " lect being first made of due payment of the same ;
 " which protest shall be made and written under a
 " fair written copy of the said bill of exchange, in
 " the words or form following :'' *Know all men, that*

I, A. B. on the day of
at the usual place of abode of the said
have demanded payment of the bill of which the above
is the copy, which the said did not pay ;
wherefore I the said do hereby protest
the said bill. Dated at this
day of

" which protest so made,
 " shall within fourteen days after the making there-
 " of be sent, or otherwise due notice shall be given
 " thereof to the party from whom the said bill or
 " bills were received, who is, upon producing such
 " protest to repay the said bill or bills, together
 " with all interest and charges from the day such bill
 " or bills were protested, for which protest shall be
 " paid a sum not exceeding the sum of six-pence ;
 " and in default or neglect of such protest made and
 " sent, or due notice given within the days before
 " limited, the person so failing or neglecting
 " thereof is and shall be liable to all costs, damages
 " and interest, which do and shall accrue thereby."

And herein is contained a proviso that in case an in-
 land bill is lost or miscarried, the drawer shall give
 another, whereof we have treated in the third sec-
 tion of our seventh chapter.

As

As this statute could not operate, unless the party, on whom the bill was drawn, accepted it by underwriting the same, which few or none cared to do, it was defective: to remedy which the before-mentioned statute of 3 & 4 Ann. was made; whereby it was provided that, in case the party on whom an inland bill of exchange shall be drawn, shall refuse to accept the same, by underwriting it, or by an indorsement in writing, the party to whom payable shall cause such bill to be protested for non-acceptance as in case of foreign bills, for which protest shall be paid 2s.* and no more. And that no acceptance of such inland bill shall charge any person, unless under written or indorsed; and if not so underwritten or indorsed, no drawer shall pay costs, damages, or interest, unless protest be made for non-acceptance, and within fourteen days after protest, the same be sent, or notice thereof given to the party from whom such bill was received, or left in writing at his usual place of abode; and if such bill be accepted, and not paid within three days after due, no drawer shall pay costs, damages, or interest thereon, unless protest be made and sent, or notice given as aforesaid. Nevertheless the drawer shall be liable to payment of costs, damages, and interest if any one protest be made for non-acceptance or non-payment, and notice be sent, given, or left as aforesaid,

BUT it is hereby provided that, no such protest shall be necessary either for non-acceptance or non-payment, unless the value be expressed in such bill to be received, and unless the bill be drawn for 20l. or upwards, and that the protest hereby required

* The usual charge of protest in and about London is 5s. whereof 2s. is the stamp duty. But see more concerning this hereafter towards the conclusion of our second section.

for non-acceptance shall be made by such persons as are appointed by the statute of 9 & 10 W. III.

AND it is enacted by this statute of 3 & 4 Ann. that, if any person accept such bill of exchange in satisfaction of any former debt, the same shall be esteemed a full payment, if he doth not use his endeavour to get the same accepted and paid, and make his protest for non-acceptance or non-payment. Provided that nothing herein contained shall extend to discharge any remedy that any person may have against the drawer, acceptor, or indorser of such bill.—For more concerning accepting a bill in satisfaction of a former debt, see the latter part of the fourth section in our ninth chapter.

FROM this relation it appears by whom the protest is to be made, and that the statute 9 & 10 W. III. c. 17. gives power of protesting any inland bill of exchange of five pounds or upwards, (in which is acknowledged and expressed the value to be received;) yet this act had no effect, unless the party on whom the bill was drawn, accepted it by underwriting, and that therefore by the statute 3 & 4 Ann. c. 9. the same power is given in case the party refuse thus to accept, or to accept it by an indorsement in writing, with proviso that no protest, shall be necessary, unless the bill be drawn for twenty pounds or upwards.

AND thus having taken a view of those statutes, we come now to treat on the determinations of the courts had thereon with respect to the protest; and here we may observe that a protest on a foreign bill was part of its constitution; on inland bills a protest is necessary by the statute 9 & 10 W. III. but it was not necessary at common law; and this statute does not take away the plaintiff's action for want of a pro-

a protest, nor does it make such want a bar to the plaintiff's action; but seems only in case there be no protest, to deprive the plaintiff of *interest* and *costs*, and to give the drawer a remedy against him if he makes no protest.

As in the case of *Borough* against *Perkins*, Mich. 2 Ann. where a writ of error was brought on a judgment by *nil dicit*, in an action against the drawer of an inland bill of exchange, and it was objected that since the act of 9 & 10 W. III. no damages shall be recovered against the drawer upon a bill of exchange, without a protest, and therefore the action lies not, there being no protest. But by Holt, chief justice: the statute never intended to destroy the action for want of a protest, but only to deprive the party of recovering interest and costs upon an inland bill against the drawer, without notice of non-payment by protest: For before the statute there was this difference between foreign and inland bills of exchange; if a bill was foreign, one could not resort to the drawer for non-acceptance or non-payment without a protest, and reasonable notice thereof. But in case of an inland bill, there was no occasion for a protest; but if any prejudice happened to the drawer by the non-payment of the drawee, and that for want of notice of non-payment, which he to whom the bill is made ought to give, the drawer was not liable; and the word damages in the statute, was meant only of damages that the party is at by being longer out of his money by the non-payment of the drawer, than the tenor of the bill purported, and not of damages for the original debt: And the protest was ordered for the benefit of the drawer; for if any damages accrue to the drawer for want of a protest, they shall be born by him to whom the bill is made; and if no damages accrue to him, then there is no harm done him,

him, and a protest is only to give a formal notice, that the bill is not accepted, or is accepted and not paid; and if, in such case, the damages amount to the value of the bill, there shall be no recovery, but otherwise he ought not to lose his debt; but that ought either to appear by evidence upon *non-assumpsit*, or by special pleading, and the act is very obscurely and doubtfully penned, and we ought not by construction upon such an act to take away a man's right. And the judgment was affirmed by the whole court.*

In the case of *Powel and Moliere* in chancery, 10 Geo. II. which is described at large in the first section of our next preceding chapter, and there shewn that a bill was for satisfaction of a bill of exchange drawn upon the defendant and accepted by him; and pending the suit, the original defendant died, and it was revived against his executors. Here lord Hardwicke being satisfied as to the acceptance, his lordship said; as to the plaintiff's being intitled to interest, I think it a clear case that he is, though no protest has been made; for that it is necessary only to intitle the payee to damage against the drawer; and all the damages that can be had in such a case is the interest. And his lordship decreed for the defendant to pay the *bill of exchange* with interest at the rate of four *per cent.* The plaintiff to pay the costs to the time of the bill of revivor, and after each party to bear their own costs.

Hence the use and effect of the protest may be perceived, and we may just observe that it subjects the drawer to answer in case of non-acceptance or non-payment; but does not discharge the acceptor if the bill be accepted; for the payee, or person to

* ; Salk. 131, Lord Raym. 993.

whom

whom payable, hath now two remedies, one against the drawer, and the other against the acceptor.^b Nor does it raise any debt, but only serves to give formal notice that the bill is not accepted, or accepted and not paid; and this by the common law was, and is still necessary on every foreign bill before the drawer can be charged; but it was not required on any inland bill before the statute 9 & 10 W. III. and the want of it since that statute does not destroy the remedy, which the party had before against the drawer, for the principal;^c and it is now only necessary by those statutes to intitle the party to interest and costs.

§ II. WITH respect to protest on foreign bills of exchange; this is absolutely necessary to intitle the party to recover against the drawer, not only interest and costs, but likewise the principal sum; and for this purpose the bill must be presented in a reasonable time; and in case of refusal of acceptance, or in case the drawee cannot be found, it must be protested in a reasonable time, and notice of such protest after acceptance and non-payment given to the drawer in a reasonable time;^d whereof mention will again presently be made.

If the protest be made before a notary publick, in case of non-acceptance or non-payment, all foreign courts give credit thereto; and the protest is evidence that the bill is not paid; but in England the bill itself as well as the protest must be shewn, because the whole declaration must be proved.—When the bill is returned protested, the party that draws the bill is obliged to answer the money and damages, or to give security to answer the same be-

^b Molloy, l. 2. c. 10. sect. 17. ^c *Ibid.* 613.

^d 3 New Abr. 612.

yond sea, within double the time the first bill run for.—In case of foreign bills of exchange, the custom is, that three days are allowed for payment, and if not paid on the last day, the party ought to protest the bill and return it, and if he does not, the drawer will not be chargeable; but if the last of the three days be a Sunday, or great holiday, he ought to demand the money on the second day, and if not paid, protest it on the same day, otherwise it will be at his own peril.*

A. drew a bill of exchange in the West-Indies, on T. in London, at sixty days sight, to W. or order; W. indorsed to G. who presented the bill to T. who refusing, G. noted it for non-acceptance, and at the end of sixty days, protested it for non-payment, and then wrote a letter to A. and also to his agent in the West-Indies, acquainting them that the bill was not accepted. In an action brought against A. by G. on this case, he was non-suited; for by not sending the protest for non-acceptance, he made himself liable. The use of noting is, that it should be done the very day of refusal, and the protest may be drawn any day after by the notary, and be dated of the day the noting was made.—For noting, the notary presents the bill and demands acceptance, or payment, which, if refused, he sets his initials, month, day, and year, with his noting charge in the bill; as thus, "E. L. Sept. 18th, 1788, 1s. 6d." If the notary goes without the

* Law of Nisi Prius, 270. Edit. 1785.

¹ *Ibid.* 271. Cites *Gosfry and Mead*, West. 1771.—If a foreign bill of exchange be protested for non-acceptance; it must be kept till due, and the protest only sent to the drawer,

which will oblige him to find security for the payment; but if for non-payment, both the bill and protest must be returned, in order to recover its contents with costs. Gordon's Universal Accountant, 2 v. p. 353.

walls of London, his charge is 2s. 6d. and if any considerable distance, 3s. 6d. If the bill is protested, 5s. are added.

§ III. AS to when and on what occasions the protest is to be made, being in some respects shewn in the preceding sections, and divers instances thereof in the first, eighth; and tenth-sections of the next preceding chapter, in the eighth section whereof we have mentioned that, when a bill of exchange is drawn, it is usually presented soon after to the drawee for acceptance, and if the bill when left for acceptance, should happen to be lost or mislaid, what in such case is to be done. Here we may observe that the drawee must be desired to accept the bill before there can be a protest for non-acceptance; but if he be dead, or cannot be found, these are good causes for protesting the bill: also if after acceptance, the drawee dies, there is to be a demand of his executors, or administrators, and in default of payment a protest; and in case the money becomes due before an executor or administrator can be appointed, yet this delay is sufficient cause to protest the bill.^a

BUT if he to whom the bill is to be paid, dies, there can be no protest before a probate of his will, or administration granted; for none but his executors or administrators can give a legal discharge or acquittance for the money, and consequently no other person can sue for, or demand the same; and though security be offered to indemnify the drawee against the executors, yet he is not obliged to accept thereof, being a matter left entirely to his consideration, to judge and determine on the sufficiency of such security; and in this case it is said, that if

^a 3 New Abr, 612.

a publick notary protest the bill, an action on the case lies against him.^b

As to non-acceptance; where a bill has been presented for acceptance, which hath been refused, or where the drawee be dead, or cannot be found, those, as we have just before mentioned, are good causes for protesting the bill, the use and effect whereof, we have heretofore treated on in our two foregoing sections; and from the first, it is perceivable that the protest on inland bills is required to be sent, or notice thereof given within fourteen days after the same are protested; but with respect to foreign bills, towards the latter part of our second section, we have seen that the protest of those must be sent to the drawer.—Concerning giving the drawer and indorser notice of a bill being dishonoured, we have largely treated in our ninth chapter. And in the ninth section of our next chapter preceding this, it is shewn, that if acceptance be refused, an action will lie against the drawer, although the time of payment is not come.

With respect to non-payment, we have seen in our first section of this chapter that, if protest on an inland bill be made for non-payment, the same must be sent to the drawer, or notice thereof given him within fourteen days after; but as to foreign bills, in our second section it is shewn that, the protest and bill must be sent; and that if the last of the three days allowed for payment be a Sunday, or great holyday, the party ought to demand the money on the second day, and if not paid, protest the bill on the same day.—It is said by Molloy^c, that, for non-payment within three days, protest is made, but is not sent away till the next post after

^b 3 New Abr. 612. ^c B. 2. c. 10. § 39.

the time of payment is expired; and if Saturday is the third day, no protest is made till Monday. By Marius^d: This is a general rule, namely, that according to the custom of merchants in London, protest ought to be made for non-payment within three days after the bill falls due, and the protest ought to be sent away by the next post after the time of payment is expired, be it for what part soever.—The holding bills after being dishonoured, and giving notice to the drawer, or indorser, is largely treated on in our ninth chapter.

CONCERNING protest for better security. The custom of merchants is, that if a merchant who hath accepted a bill of exchange, shall happen to be insolvent, and abscond before the day of payment, he to whom it is payable, may protest it to have better security for the payment, and to give notice to the drawer of the absconding of the drawee; and after time of payment is incurred, then it ought to be protested for non-payment.^e But by merchants at Guildhall, Trin. 6 W. & M. it was proved before chief justice Treby, that no protest for non-payment can be before the day whereon the bill is payable.^f

§ IV. PARTY to whom a bill is payable shall not make use of the second bill of exchange to charge the drawer, when the first bill was accepted, and he staid beyond the usual time, and did not protest the first bill for non-payment; as in the case of *Collet* against *Jennis*, at the sittings in London before lord Hardwicke, Trin. 9 Geo. II. This was an action against defendant, the drawer of a foreign bill of exchange. The bill on which the action was brought was drawn at Denmark, upon one Cheney,

^d P, 97. ^e Marius, 111, 117. ^f Lord Raym, 742.

dated August 8, 1733. *At two months sight pay this my second bill of exchange, my first not being paid.* Plaintiff's witnesses swore that plaintiff having received the first bill from Denmark on the 14th of August, sent it in a letter into Norfolk to Mr. Cheney for acceptance, but that it was never returned, but, as they supposed, miscarried; that about the latter end of January Mr. Cheney died, leaving his wife executrix, and plaintiff having got the second bill after the death of Mr. Cheney, tendered it to his executrix, and required payment; but she refusing, plaintiff protested it, and brought this action against the drawer of it.

DEFENDANT'S counsel insisted, that the first bill had been actually accepted by Mr. Cheney in his life time, and to prove it produced plaintiff's letter, dated 14th August, which inclosed the bill and required acceptance of it, and also another letter from plaintiff to Mr. Cheney requiring payment thereof with interest, and also another letter sent by plaintiff to Cheney's widow requiring payment; from all which the counsel concluded, that it manifestly appeared that, the bill had been accepted by Mr. Cheney in his life time, and that plaintiff had given him credit for the money, and that therefore, as plaintiff never protested the bill for non-payment, nor gave notice to the drawer that it was not satisfied, it must be presumed that he took the bill on himself, and trusted to Mr. Cheney as his paymaster; and that plaintiff should not, after this length of time, have any remedy against the drawer. And of this opinion was the chief justice, who said there could be no doubt but that the first bill had been accepted, or else there could have been no room for plaintiff to have demanded interest from Mr. Cheney, neither could he have any remedy against Mr. Cheney's executrix without such acceptance; and

if so, then the plaintiff having trusted so long on Mr. Cheney's credit, must not now come upon the drawer; for this would be making a wrong use of the second bill, which was made only as a security lest the first might be lost, but not to entitle plaintiff to bring any action upon it, after the first bill was accepted; for that would be making use of it as a new bill.

PLAINTIFF'S counsel insisted he could prove an actual promise by the drawer after Mr. Cheney's death to pay this bill, and said there was a proper count laid in the declaration for that purpose; which promise, as appeared afterwards by the evidence, was thus: defendant being at London, called at plaintiff's house, and being informed that the bill was not paid by Cheney, he asked whether he was liable to make it good, and the plaintiff, or his clerk, told him, yes; whereupon he desired that the plaintiff would have a little patience, for he was going into the country, and would speak to Cheney's executrix, and would take the needful care that the bill should be paid; but this, the chief justice said, was not sufficient to bring it within the promise laid in the declaration, which was founded on the consideration that he was liable, and if that was founded on a mistake, as being misinformed by the plaintiff, or his clerk, this ought not to bind him; and therefore upon the whole, lord Hardwicke, chief justice, thought defendant not at all liable under these circumstances: And thereupon plaintiff was nonsuited.*

* Cunningham's Reports.

CHAPTER VI.

- § 1. *Of general and particular Indorsements.*
- § 2. *Negotiability restrained by Indorsement.*
- § 3. *Indorsement must be for the whole Sum drawn for.*
- § 4. *Indorser of a Blank Note or Check may be liable to the Payment of any Sum inserted therein after the Indorsement is made.*
- § 5. *Where a Bill of Exchange is drawn by two (not being in Partnership) payable to "Us or our Order," and subscribed by both; it should be indorsed by both.*
- § 6. *Of the Indorsement on Bills and Notes drawn payable to Bearer.*
- § 7. *Who may indorse. Of Indorsement by Executors and Administrators, and to Executors. By a married Woman. Bill payable to one for the Use of another, may be indorsed over by him to whom made payable.*

§ I. **I**N our second chapter, section the fourth, paragraph the third, we have seen that bills of exchange and promissory notes, where the sum therein expressed amounts to 5l. or upwards, may be assigned from one to another, *in infinitum*, either by a blank or general indorsement, as by the payee or indorsee writing his name on the back thereof; or, by a particular indorsement, as by directing it to be paid to the bearer or another person by name; from whence and the subjects of this chapter, may be perceived the law hath not appointed any set form of words as necessary to this assignment, only that it must be in writing; and if a man has a bill of exchange, he may authorize another to indorse his name upon it by *parol*; and when that is done, it is the same as if he had done it himself.*

BUT although the law hath not appointed any set form of words as necessary to this assignment ; yet attention to the making thereof is very necessary to be had, much litigation having been occasioned, by particular indorsements ; and therefore where the negotiability of a bill is not intended to be restrained by indorsement, (concerning which we shall treat in our next ensuing section) a blank or general indorsement is the most safe and proper, as clearly demonstrated in the case of *Edie and Laird* against the *East India-Company*, which we shall presently relate ; after just mentioning that, it hath been common to indorse with an indorsement, as pay, &c. to indorsee or order. And where a bill of exchange was indorsed in this manner : *Pay the contents of this bill unto the order of J. S.* who brought his action as indorsee, averring he had made no order to any body to receive the money ; and on demurrer it was objected, that J. S. could not maintain an action ; because the indorsement was not to him, but to his order : But the court held the action well brought against the indorser ; and that, amongst tradesmen, this form of indorsement is commonly used, although it is intended to be made payable to the person, whose order is mentioned.^b

In the case of *Edie and Laird* against the *East-India Company* in King's Bench, Trin. 1 Geo. III. it was determined that a bill payable to A. or order, and indorsed personally to B. may be afterwards indorsed by B. to another. In this case an action was brought on two bills of exchange, of 2000l. each, drawn by R. Clive on the East-India company, at three hundred and sixty-five days after date, payable to R. Campbell, or order. Campbell indorsed one to Ogleby, or order, the other to

^b 3 New Abr. 609.

Ogleby, without adding the words, *or order*. But at the trial, the words *or order* appeared upon the indorsement in another hand writing. The East-India company accepted both bills. Ogleby then indorsed them to the plaintiffs, and soon after became insolvent. The company then refused payment. The jury found a verdict for the plaintiffs on the first bill, but for the defendants on the second; apprehending, that by the usage of merchants it was not assignable, without the words *or order* in Campbell the payee's indorsement.

THE plaintiff not being reconciled to this verdict found on the second bill, moved the court for a new trial. 1st. Because the bill, being once negotiable, could not lose its negotiability by Campbell's writing some words and omitting of others. 2d. On the footing of surprize; the plaintiff not being prepared to give evidence of the custom of merchants; and the evidence given by defendants being not of facts, but merely of opinion. And having obtained a rule to shew cause why there should not be a new trial; after arguments by counsel on both sides, the court delivered their separate opinions.

LORD MANSFIELD, chief justice: There can be no dispute where the indorsement is in blank. There you may write over it whatever you please. And it has been permitted to be done even in court. But for this there is no occasion. Every thing shall be intended upon such a blank indorsement. The point relied on at the trial for the defendants was, that where a special indorsement was made to A. B. and the indorser omitted the words, *or order*, this was equivalent to the most restrictive indorsement. Many witnesses were examined by defendants to prove this usage; but it did not appear that in any one act, the indorsee of such special indorsement, ever lost

lost the money, by such omission. The evidence was only matter of opinion.—I told the jury, that upon the general law (laying usage out of the case) the indorsement carried the property to Ogleby, and that the negotiability was a consequence of the transfer. But if they found an established usage among merchants, that where the words, *or order*, were omitted, the bill was only negotiable on the credit of the indorsee, they should find for the defendants. If otherwise, or they were doubtful, then either for the plaintiffs, or make a case of it. They found for the defendants on the bill in question; for the plaintiffs on the other, concerning which there was no dispute.

Now, upon the best consideration I have been able to give this matter, I am very clear of opinion, that at the trial, I ought not to have admitted the evidence of usage. But the point of law is here settled: and when once solemnly settled, no particular usage shall be admitted to weigh against it. This would send every thing to sea again. It is settled by two judgments in Westminster-Hall, both of them agreeable to law and convenience. The two cases I go upon, are *Moore and Manning*, in Comyns [311], and *Acheson and Fountain* in Strange [557]. These cases goupon a general proposition in law, that an indorsement to A. implies *or order*, and is negotiable.—The main foundation is, to consider what the bill was in its origin. The present bill in its original creation, was not a bare authority, but a negotiable draught. There are no restrictive words in it. And whatever carries the property, carries the power to assign it.—It were absurd, if the merchant's opinion should prevail, that this is now converted into a personal authority. If it be such, and the indorsee dies, it could not go to his executors and administrators.

ministrators; in whom most clearly the property of the bill does vest.

UPON this ground, that the point is settled both by King's Bench and Common Pleas, and well settled, I think there should be a new trial. Otherwise also, I should be of the same opinion. Certainly, the suggestion of surprise, is not in all cases a reason for a new trial; but in particular cases, such as the present, it may be.—The question of costs is very peculiar. There is a verdict in part for the plaintiff, which already carries costs for him. But for form's sake we must set aside the whole verdict, which is usually done on payment of costs. But this will be giving defendants costs, which they could not otherwise have, merely because they have obtained an improper verdict. Therefore, I think, that under these particular circumstances, the verdict should be set aside without costs.

JUSTICE DENNISON: I am of the same opinion. If the words to A. B. only were inserted, I should think it would not be restrictive: at least it should be left to a jury. In *Roxlinson and Stone*, M. 20 Geo. II. an inland bill of exchange was drawn payable to A. or order, who indorsed it to B. without adding any more. The question was, whether there was such an interest in the executor of the assignee, as that he might assign it. The court held, upon inquiry from merchants, that it might be indorsed thus: "C, executor or administrator of B." when a man says, "pay to A." the law says, it is "to A. or order." He then says, I intend it should not be so. What signifies what you intend? The law intends otherwise.^b—Where a bill is originally

^b 1 Black. Rep. 295.

made payable to A. *or order*, it is of course, and in its very essence negotiable from hand to hand. An inland bill of exchange is assignable in its nature *toties quoties*,^a and promissory notes are now upon the same foot with them. Foreign bills of exchange are equally so by the law of merchants, and by the settled determinations of the courts of law in England.^a

JUSTICE FOSTER: I am of the same opinion. This is now the settled law, and ought not to have been left to a jury. People talk of the custom of merchants. This word custom is apt to mislead our ideas. The custom of merchants, so far as the law regards it, is the custom of England; and therefore, lord Cook calls it, very properly law-merchant. We should not confound general customs with special local customs.

JUSTICE WILMOT: There are two questions. Whether the law is fully settled, and upon what principle? it is certainly now settled, and upon those principles. The original contract between the drawer and payee, is to pay to the payee and his assigns, and the assigns of such assigns, *in infinitum*. There is the same privity, between the drawer and the last assignee, as the first. The first assigns over that *chose in action*,^a which, in its nature, and by the express permission of law, is assignable, with the same privileges and advantages, that it had when he received it. It might be a considerable question, whether a man can limit and modify the property or not, even by express words of restriction, so as to check its currency. By giving a bare authority he

^a Explained heretofore in c. 2. sect. 1.

^a Explained heretofore in c. 2. sect. 4.

^a Burr. Rep. 1216.

may do it; as "pay to A. for my use."—But if he indorses it generally I should have a doubt; supposing it purchased by an indorsee for a valuable consideration. In the present case, I think assigning it to A. carries the property with all its qualities. It implies a consideration to have been given.—The justice after some further relation as in corroboration of what he had delivered says, custom of merchants is the general universal law. Facts must be reiterated to make such a custom. The opinion of merchants is nothing. Special custom of merchants has been controlled in a case, where an indorser had divided a note and indorsed it to several persons [the case alluded to is related in the third section of this chapter].—The whole court being unanimous, a new trial was granted without payment of costs.

§ II. CONCERNING the negotiability of bills restrained by indorsement, some mention has just before been made in the latter part of our next preceding section; and this being a matter of no small moment to merchants and traders in general, we shall here relate the case of *Ancher and others, against the Governor and Company of the Bank of England*, Easter, 21 Geo. III. wherein is contained much learning on this head; and as the purport of this case may be rather intricate to some of our readers at first sight, after relating it, we shall make some brief observations thereon by way of explanation.

THE case was as follows. One captain Dahl, a Dane, and resident in Denmark, being indebted to the house of Claus Heide and Co. in London, applied to one Mæstue, to procure him a bill from the plaintiffs at Christiana, on Claus Heide and Co, with whom they had a correspondence; which bill

† 1 Black, Rep. 295.

was as follows.—“ Christiana, 17th January, 1778.
 “ Two months after sight, please to pay this, our sole
 “ bill of exchange, to Mr. Jens Mæstue, or order, one
 “ hundred and twenty pounds sterling, value in ac-
 “ count, and place it to account, as per advise from
 “ Karen, widow of Christian Ancher, and sons.—
 “ To Messrs. Claus Heide and Co. London.”—On
 this bill was written by Mæstue, an indorsement in
 the Danish language, of this import :—“ The with-
 “ in must be credited to captain Morten Larsen
 “ Dahl, value in account. Christiana, 17th Janu-
 “ ary, 1778, Jens Mæstue.”—And it was remitted
 to Claus Heide and Co. in the following letter :—
 “ Agreeable to the desire of captain Morten Larsen
 “ Dahl of Arendal, I have inclosed, for his account,
 “ sent you Karen Ancher and son's bill, on your-
 “ selves, for 120 l. which you will, on receipt, be
 “ pleased to credit his account with, and advise
 “ him of the same.”—The bill was received by
 Claus Heide and Co. and accepted, and they gave
 notice to the plaintiffs, and to Dahl, that they had
 received it, and placed it to his account. After-
 wards a forged indorsement in English, was written
 upon it as follows.—“ For me, to pay Mr. Detleff
 “ D. Muller, or order. Morten L. Dahl.”—Muller,
 who was a clerk in the house of the acceptors,
 carried the bill, thus indorsed, but which had never
 been in the hands of Dahl, to the bank, and in-
 dorsed it with his own name, upon which it was
 discounted, in the ordinary course of business. When
 the day of payment came, the acceptors having
 become insolvent, and Muller having absconded,
 the bill was protested; and one Fulberg, as a friend
 or agent for the plaintiffs, came to the Bank, and
 paid it for their honor as the drawers; but, the
 forgery having been discovered, this action for
 money had and received was brought against the
 bank, on the ground that the bill was not negoti-
 able

ble on account of the special indorsement, and that it had, therefore, been discounted by the Bank in their own wrong, and the money paid by Fulgberg, to take it up, paid by mistake.

THIS cause being tried at Guildhall, before lord Mansfield, at the sittings after last term, his lordship directed a nonsuit: and now it came on in court, on a motion for setting aside the nonsuit, and granting a new trial, and hereon, after the counsel had closed their arguments, the judges delivered their several opinions.

LORD MANSFIELD: The ground of the nonsuit was, that the purpose for which the bill was drawn was answered, it having been applied to the credit of Dahl, and he having acquiesced. It therefore occurred to me, that the drawers had received no injury, and had no interest. But, (which was not attended to at the trial) there has been a second payment for the honor of the plaintiffs, and it is contended, that a consideration has arisen on the second payment. Where there is equal equity possession must prevail; and the equity is equally between persons who have been equally innocent and equally diligent. The question therefore, is, whether the Bank has been equally diligent. A bill though once negotiable, is certainly capable of being restrained. I remember this being determined upon argument. A blank indorsement, makes the bill payable to bearer, but, by a special indorsement the holder may stop the negotiability. Mæstue did so here. It does not seem to me, that, after the special indorsement by Mæstue, Dahl himself could have indorsed it over. Mæstue did not mean to make himself answerable as indorser, or to enable Dahl to raise money on the bill. The Bank could not have maintained an action on the bill, against the

the plaintiffs. It was their negligence not to read the special indorsements.

JUSTICE WILLES: I am of the same opinion. The question is whether the negotiability is not restrained by the indorsement; and I think it is. The Bank either did read, or ought to have read the indorsement. The only doubt is, what shall be the effect of the bill's having been taken up by a third person; but I think he must be taken to be the agent of the plaintiffs.

JUSTICE ASHHURST: I am of the same opinion. The question is, did the Bank use due diligence? If they had attended to the indorsement, they would not have discounted the bill. I think Dahl himself could not have indorsed it. It was never the intention that Claus Heide & Co. should pay the money to Dahl, but only that the money should be set off in his account. If the Bank have taken a bill not negotiable, it is their own fault, and they are not entitled to retain the money which has been paid them by mistake.

JUSTICE BULLER: I have the misfortune to differ from the rest of the court. As to the forgery, it was decided in the case of *Price against Neale* [related in the fifth section of our seventh chapter] in this court, that if a forged bill has been taken up, the money shall not be recovered back from an innocent indorsee. Therefore, as against such an indorsee, the forgery is not material. As to the indorsement by Mæstue, it amounts to an indorsement to Dahl, and makes him the proprietor; and the bill being originally negotiable; it seems to me to have continued so. What is called a restrained indorsement, viz. that the bill was to be credited to Dahl, appears to amount to the same thing as

“ Pay

"Pay to Dahl." The words "or order" are omitted, but it has been determined, that such omission does not stop the negotiability of a bill. The circumstance, that there was an account between Dahl and the drawees, cannot affect third persons who knew nothing of that account. But if the bill was only meant to pay the drawees, why was it not cancelled by them when they received it? Why did they accept it? Did not that hold out negotiability to the rest of the world? This is an answer to any supposed negligence in the defendants. Besides, if the bill was not meant to be negotiable, why did the plaintiffs take it up? That was done by another person, as it is said, for their honor; but they have by bringing the action, adopted this act.

LORD MANSFIELD: The whole turns upon the question whether the bill continued negotiable. As the case stands at present, let the nonsuit be set aside, but we will consider of it farther, and if we alter our opinions we will mention it.—This case was never mentioned any farther. The rule was made absolute, and the cause again tried, at the ensuing sitting, before lord Mansfield, when the jury by his lordship's directions found a verdict for the plaintiffs.*

AND upon the whole hereof, we may now observe that by a special indorsement the negotiability of a bill may be restrained; and as concerning the bill here litigated, it may be observed, 1st, That this bill being drawn by Karen Ancher, on Claus Heide Co. payable to Jens Mæstue, or order, and indorsed by Mæstue in these words, "the within bill must be credited to Captain Morten Larsen Dahl, value in account." Dahl being indebted

* Doug. Rep. 637. 2 Edit.

to Claus Heide & Co. and the bill being sent to and accepted by them, who having given Dahl notice that they had received it, and placed it to his account. This is such a special indorsement as restrains the negotiability of the bill.—2dly. That, although, afterwards a forged indorsement purporting to be by Dahl to Muller, or order, written upon it, and the bill is discounted, the person discounting it shall stand to the loss.—3dly. That if an agent of Karen Ancher, the drawer, (who Claus Heide & Co. were become insolvent) pay the money for the drawer, and take up the bill, the drawer may recover back the money paid by his agent to the person who discounted it, in an action for money had and received.

§ III. INDORSEMENT must be for the whole sum drawn for. A bill of exchange cannot be assigned over for a payment in part, so as to subject the party to several actions.* And where the defendant had given a note under his hand to pay unto E. G. or order a certain sum of money. E. G. by indorsement on this note, ordered part of the money to be paid to the plaintiff. Upon which an action was brought; and a special custom amongst merchants was laid in the declaration, according to the plaintiff's case. Upon a demurrer to this declaration it was adjudged that this is a void custom, because by means of such division, the defendant would be subject to as many actions, as the persons whom the note was given should think fit; and this upon a single contract subjected him to one action only.*

§ IV. INDORSER writing an indorsement on

* Law of Nisi Prius, 271.

* Carth. 466. 1 Salk. 6.
2 Burr. Rep. 1228.

blank note or check, may be bound for any sum and time of payment which the person to whom he entrusts the note chooses to insert in it; as in the case of *Russel* against *Langstaffe*. Mich. 21 Geo. III. Where one Galley having had frequent money transactions with the plaintiff, who was a banker, and having over-drawn his cash account, the plaintiff, suspecting his credit, refused to advance him any more money, without the addition of the name of some indorser of whom he should approve. Upon this Galley applied to the defendant, and he indorsed his name on five copper-plate checks; made in the form of promissory notes, but in blank, i. e. without any sum, date, or time of payment, being mentioned in the body of the notes. Galley afterwards filled up the blanks with different sums and dates, as he chose, and the plaintiff discounted the notes. One of them was made payable on the 22d of September, two on the 27th of September, and two on the 4th of October. These notes not being paid when they became due, the plaintiff, on the 4th of October, called upon the defendant, as indorser, for the payment of all of them, and upon his refusal, brought this action, which was tried, before baron Hotham, at the last assizes for the county of Durham. It appeared that Galley had become bankrupt on the 20th of September, and that, on the 27th, the defendant had been present at a meeting of his creditors. It also appeared, that Russel knew the notes were blank at the time of the indorsement. The plaintiff and the defendant lived in the same town.

For the defendant at the trial, it was objected, That these notes being blank at the time of the indorsement, they were not then promissory notes, and that no subsequent act of Galley could alter the original nature or operation of the defendant's signature,

nature, which, when it was written, was a mere nullity. It was also objected, 2. That the notice of the non-payment by the drawer, was not given soon enough by the indorser. And the judge being of opinion with the defendant on the first point, he directed the jury accordingly, and they found a verdict for him.

BUT a rule being obtained in this term to shew cause why there should not be a new trial, this case was now argued, whereon Mr. Lee, one of the defendant's counsel, on the first point argues, that, the copper-plate checks in this case, without sum or date, were mere waste paper, and Langstaffe's name upon them had no more effect than if written upon any other blank piece of paper. That an indorsement supposes a bill or note, then actually existing, and if a party takes an indorsed bill or note, *knowing* at the time, that it was not the subject of an indorsement, when the name was written on the back of it, he is not injured, *if* he is afterwards told, that he shall not be permitted to treat it as a bill or note. That the very declaration, in this action, necessarily states a pre-existing note, previous to the indorsement, and such forms are not to be considered as useless and without a meaning. On the second point, defendant's counsel argues that, proper notice was not given of non-payment of the bills; and said it was well established, that such notice ought to be as early as possible. That, where the parties live at a distance, the notice ought to be given by the first post, though if any thing delay the going out of the post at the usual time, that will be an excuse; but that, here, the parties lived in the same town, and no notice had been given till ten days after the time of payment, even in the case of the notes payable in October. As to the bankruptcy, it had been frequently ruled by
lord

lord Mansfield, at Guildhall, that it is not an excuse for not making a demand on a note or bill, or for not giving notice of non-payment, that the drawer, or acceptor, has become a bankrupt; as many means may remain of obtaining payment, by the assistance of friends, or otherwise.

MR. DUNNING, plaintiff's counsel states, that the jury on the second point were clearly with the plaintiff, and that they had found a verdict for the defendant, in deference to the judge's opinion on the other question. As to that question, he insisted that there could not be a doubt, but the direction was wrong. It strengthened the plaintiff's case, that he knew the notes were blank when indorsed. For what purpose could he suppose the indorsements were made by the defendant, but to authorize Galley to fill them up with any sum he pleased, and to bind himself as his security, to that extent. The declaration states the notes to have been made before the indorsements; so all declarations against indorsers must; but the defendant, by indorsing them concludes himself from contending, or proving, that they were not filled up when he signed them.

BY LORD MANSFIELD: There is nothing so clear as the first point. The indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said, "Trust Galley to any amount, and I will be his security." It does not lye in his mouth to say, the indorsements were not regular. The direction having been wrong on this point, it is needless to go into the other.—Hereon the rule for a new trial was made absolute. But before there was an opportunity for a new trial, another action between the same parties, and under similar circumstances, came on before lord Mansfield, at Guildhall, and, a verdict being found for the plaintiff, the

defendant submitted to this action, without going to a second trial.*

§ V. WHERE a bill of exchange is drawn by two (not being in partnership) payable "*to us or our order*," and subscribed by both, it should be indorsed by both; as appears by the case of *Carvick* against *Vickery*, Hil: 23 Geo. III. wherein the action was brought by the indorsee of a bill of exchange, which was in the following form: "Mr. *Abrabam Vickery*,—Two months after date, please to pay to "*us or our order*" the sum of, &c.—*John Maydwell*. "*—John Maydwell*."

The bill was indorsed thus;

"*Jn. Maydwell*,
Holloway."

The Maydwells were father and son. The indorsement was by the son. They were admitted not to be partners. The bill, when due, was presented to the defendant, and accepted, and, at the time of the acceptance, he wrote upon it a direction to his banker to pay it. The cause was tried at the sittings after Mich. Term, 23 Geo. III: at Guildhall, before lord Mansfield, who non-suited the plaintiff, because there was not an indorsement by both the parties, to whose order the bill was made payable. In Hilary term next ensuing a rule being obtained to shew cause, why there should not be a new trial, this case was argued by counsel on each side, on the 1st of February.

In support of the non-suit, it was insisted that it was clear, when two or more persons are the payees of a bill of exchange, (which in this case the drawers were) and there is no partnership be-

* Doug. Rep. 514. 2 Edit.

tween them, the indorsement of one will not bind the rest, nor make the bill negotiable. The only reason for the names of both the father and the son appearing to this bill, must have been, to prevent its being paid without the joint order of both. Even if the indorsement had been specially by the one, to pay for himself *and the other*, yet, without evidence of a partnership, the other could not have been bound. The first promise of the acceptor was to pay to the order of *two*, and a new promise to pay to the order of *one* could not be ~~made~~ without a consideration. It would be a *nudum pactum* [a naked agreement]. Indeed, where there is a partnership, the acceptance of one partner does not bind the others, unless the bill concerns the partnership trade. This was determined in the case of *Pinkney* against *Hall* [in chap. 4. § II]. The same thing must hold as to indorsements. If there is no case exactly on the subject, it is because the matter has never been doubted. *Whitcomb* against *Whiting* may be cited on the other side; but it is not *ad idem* [to the same point]. The statute relative to promissory notes [in c. 3. § 4.] only enables *such servant or agent as is usually intrusted* by the principal, to bind him by his signature. A partner's signature binds the partnership upon that ground; for every partner may be considered as an agent for the rest of the partnership.

On the other side, it was argued, that two persons, by joining in the same bill, hold themselves out to the world as partners, and therefore, for that purpose are to be treated and dealt with as such. It appears by the evidence, that the acceptance and order to the banker were after the indorsement; that order therefore, amounted to a recognition of the power of the one to bind the other. Besides, the son had the custody of the bill, which

implied an authority from the father to negotiate it. And there was cited the before-mentioned case of *Whitcomb* against *Whiting*.

LORD MANSFIELD, chief justice: I have looked into that case, and do not think it *ad idem*. The general question is of great importance, *viz.* Whether an undertaking, by a bill of exchange, to pay A. and B. is an undertaking to pay A. or B. We will therefore take some time to consider of it. And the court took time to deliberate from the 1st till the 4th of February, when lord Mansfield delivered their unanimous opinion, that the Maydwells, by making the bill payable "to our order," had made themselves partners as to this transaction, whereon the rule for a new trial was made absolute.

AND at the ensuing sittings at Guildhall, on 3d March, 1783, the new trial came on before lord Mansfield, and a special jury; when Wallace, counsel for the defendant, stated and offered to prove, that, by the universal usage and understanding of all the bankers and merchants in London, the indorsement was bad, because not signed by both the payees.—Howarth, counsel on the other side, objected to any evidence of that sort; insisting that the point was a question of law, and had been decided by the court. But lord Mansfield said, he did think the question was so decided as to preclude the evidence offered; and therefore, over-ruled the objection.—Wallace then called Mr. Gosling, an eminent banker, to prove the usage; but the jury *una voce*, [with one voice] declared they knew it perfectly to be as he had stated it, and without hearing the witness found a verdict for the defendant.*

* Doug. Rep. 653, 2 Edit.

§ VI. AS to the indorsement on bills and notes drawn payable to bearer, whereof we have treated in the first and sixth sections of our third chapter. It hath formerly been held, that those were not negotiable, or assignable, so as to enable the indorsee to bring an action if the drawer refused to pay; yet the assignment was held good between the indorser and indorsee, and that the indorser was liable to an action for the money.^b But now it is held, that bills payable to bearer, are negotiable like other bills of exchange, and the holder may maintain his action against the drawer; as in the case of *Grant* against *Vaughan*, Trin. 4 Geo. III. The defendant 22d October, 1763, drew a bill in London, on Sir Charles Asgill and Co. for 70l. payable to *Ship Fortune, or bearer*, which he gave to Mr. Bignell, the ship's husband, who lost it. It was found by a person unknown; who, on the 25th of October, paid it to the plaintiff, a grocer in Portsmouth, for a parcel of teas, and took the change; having first made inquiry, and found that the drawer was a responsible person. In the mean time, Vaughan directed Sir Charles Asgill to stop payment of this bill; which produced an action, on which a special jury of merchants at Guildhall found a verdict for the defendant. And now, Norton, attorney-general, moved for a new trial.

LORD MANSFIELD, who tried the cause, reported that he left two questions to the jury. 1. Whether the plaintiff came by the note, *bona fide*, for a valuable consideration; as to which there was no dispute. 2. Whether in the course of trade, such drafts payable to bearer, were usually negotiated from hand to hand. No evidence was given to

^b Case of *Hodges and Steward*, *Horton and Coggs*, 3 Lev. 299. *Baister*, 5 W. & M. 1 Salk. 125.

found

found this verdict upon, or to shew a distinction between this and other bills of exchange.

MORTON, Eyre, and Wallace, counsel for the defendant, insisted, that this note was no bill of exchange, but merely an authority for the ship's husband to receive the money. That draughts payable to bearer, are not intended to be negotiable. And that by the old cases reported in Salkeld and Levinz, [above referred to] and the case of *Morris* and *Lee*, lord Raymond's Reports, 1397, the draught must be payable to order, to make it negotiable, and not to bearer only. And after the counsel had closed their arguments, the court delivered their separate opinions.

LORD MANSFIELD, chief justice: I shall always be more happy in acknowledging an error and correcting it, than in maintaining and persisting in it. I therefore, with great pleasure, take this opportunity to declare, that I am now convinced I mistook in the directions I gave the jury, as the case came on by surprize, and I had no time to consider it fully.—Upon general principles I was struck, and continue still of the same opinion, that since millions of property are vested in this kind of bills, it is unjust not to put them upon the same footing as common bills of exchange. When I left this matter to the jury, I did think that I had only left a plain fact, as clear as, whether there be such a thing as the bank of England. But I ought not to have left it on the footing of the usage; it being a question of law only, whether such bills are or are not negotiable: and this question, perhaps, the jury understood to be left to them; whereas I only meant to leave it thus; whether in fact such bills had usually been negotiated.

I think

I think (upon the merits) all the cases in King William's time are founded on mistaken principles. The first struggle of the merchants, (which made Holt so angry with them, *Ld. Raym.* 758.) to make inland bills of exchange in the nature of specialties, and to declare upon them as such, was certainly wrong on their parts; as it was admitted they might declare on general *indebitatus assumpsit*, and give these bills in evidence. But the reasons given by the judges, why no action can be brought by the holder of such a bill, payable to bearer, are equally ill-founded.

FIRST, it is said, they were never intended to be negotiable, *cujus contrarium est verum*. [of which the contrary is the truth.] For when payable to A. B. or bearer, they are clearly intended to be transferred in the most easy manner, even without indorsement. Also, it is said, that dangers will arise, if upon a casual loss, the finder becomes intitled (as bearer) to maintain his action for it. But the bearer must shew it came to him, *bona fide*, upon valuable consideration: And then, there is no more danger here than in losing an indorsed bill of exchange, made payable to A. B. or order. It is also said, that the action might be brought in the name of the person to whom it is first payable. In this very case it could not. Can an action be brought in the name of Ship Fortune? Many bills are payable to bearer only, without inserting any person's name. And if payable to A. B. or bearer, A. B. may not be found, may refuse to lend his name, may release, may become bankrupt, &c. which would put the bearer's property on a very precarious footing.— Besides this would be giving a third person, (the drawee) an option whether he will pay it to the bearer or no; which may be abused to unjust or corrupt purposes.

IN

IN Hinton's case, 2 Show. 235, in the latter end of Charles the Second's time, it is taken for granted, that such bills are recoverable by the bearer, if he comes to them *bona fide*. To this succeeded all the cases in King William's time, which adopt the other erroneous principle, and in all these there is great confusion; for, without searching the records, one cannot tell whether they arose upon promissory notes, or inland bills of exchange. Yet in equity, (2 Freem. 258.) it was even then held, that a bill payable to A. or bearer, was like so much money paid. Whatever transactions may be between A. and the drawer of the bill, the bearer shall have his whole money. And in Salkeld, 126, Holt held, that if a bank note be lost payable to A. or bearer, and a stranger, who finds it, transfers it to C. for good consideration, trover will not lie against C, because by the course of trade, there is a property in the assignee or bearer.

THE statute 3 & 4 Anne, c. 9. subsequent to these cases was made, to put promissory notes, in all respects, upon the same footing as inland bills of exchange. The statute expressly provides for notes payable to bearer; and therefore it may reasonably be construed to suppose, that such was the law for bills also; for else it would make a promissory note more negotiable than a bill of exchange.

THERE has since been no doubt, but that actions may be brought by bearers of such promissory notes against the drawers. In a late case, *Miller against Race*, [in c. 10. § 5.] a bank note, though stolen out of the mail, yet being negotiated and coming to the bearer *bona fide*, was held recoverable. In *Walmisley and Child*, [1 Vez. 341.] the defendant gave a shop note to A. or bearer. A. lost it, and demanded the money at Child's. They agreed to pay, if he would give

give them security, that the note should never be forth-coming to charge them. He refused, but offered a release; being advised, that no action could be brought by bearer, in case A. released. They still refused, and a bill was brought to compel the payment. Lord Hardwicke dismissed it, unless A. would give security.

It appeared, that in their books no credit was raised, but to bearer. Bearer debtor, and bearer creditor. No other name made use of, in entering this sort of note.

As this is my opinion in point of law, and as I unadvisedly left this point to the jury, there must be a new trial, upon the ground of my misdirection. And as both parties are innocent men, I think the law should decide between them, and not leave it to the partiality of the drawee, to pay which ever he likes best.

JUSTICE WILMOT: If both are equal in point of justice, *melior est conditio possidentis*, [the possessor's condition is better.] I know not how any remedy can be had, unless the bearer can maintain this action. The word bearer is only a description of the person with whom you contract.—A name is only a like description. The contract is to pay the bill either to you, or to the person to whom you shall deliver it, or to whom he shall deliver it, *in infinitum*. It is clear, that if the drawee pays it, it is good payment; and the case in *Shower* is a clear authority, that a *bona fide* holder may recover. The subsequent cases are ill-founded, and strike at the root of credit; for if only the person named in the bill can bring the action, who would ever take it in payment? but had they been well founded, the statute of Queen Anne is decisive. Bills of exchange are

are only promissory notes, to pay such a sum in case the drawee does not.

JUSTICE YATES: I am clear that the jury did wrong. In an action for money had and received, the bearer who had paid the money, had a right to call upon the drawer himself who had received it. *Ward and Evans*, lord Raymond, 928.—The judges having delivered their opinions, the rule for a new trial was made absolute.*

§ VII. WITH respect to who may indorse; it is held that an executor or administrator may indorse a bill or promissory note, within the custom of merchants; as in the case of *Rawlinson* against *Stoney*, 20 Geo. II. In the court of King's Bench, upon a writ of error, from the Common Pleas: An inland bill of exchange was made payable to A. or order. A. died, and the administrator of A. assigned the note to the plaintiff in the Common Pleas; for whom the court gave judgment upon demurrer. The court upon argument of the writ of error here, held, that the executor or administrator might assign it over: And they affirmed the judgment of the court of Common Pleas. The executor or administrator is only assignee in law; not in fact. Yet they held that he might assign it by the name of executor or administrator; and that it was the common method to do so. The indorsement virtually included it.—In the case of *King* and others executors of *Stevenson* against *Thom*, Mich. 27 Geo. III. it was held, that, where a payee of a bill of exchange indorses it to A. and B. as executors, they may declare as such in an action against the acceptor*.

* 1 Black. Rep. 485.

^b Burr. Rep. 1216.—Mention hereof is also made in the

first section of this chapter.

* Durnf. & East Rep. 487.

A NOTE payable to a *feme sole*, i. e. unmarried woman, or order, who afterwards marries, can only be indorsed by the husband.^d And where an action was brought upon a promissory note made to a married woman, and indorsed by her to the plaintiff, judgment was given for the defendant; the right being in point of law vested in the husband, and the wife having no power to dispose of it.^e

A BILL payable to one for the use of another may be indorsed over by him to whom made payable: and if A. draw a bill of exchange payable to B. for the use of C; and B. for a valuable consideration indorses it over to D; D. may bring an action against A. the drawer; and he cannot plead that the money was extended in his hands at the suit of the King, for a debt due from C. for C. being only *cestui que trust*; had only an equitable interest, and no legal remedy for the money; and B. is only responsible in equity to C. for the breach of trust.^f

WHERE in an action of debt on a single bill made to A. to the use of him and B. the defendant pleaded a release made to him by B. on demurrer, it was adjudged for the plaintiff without difficulty: for B. being no party to the deed, therefore can neither sue nor release it; but it is an equitable trust for him, and suable in the chancery, if A. will not let him have part of the money; and the book of Ed. 4. cited, that he might release in such case, was denied to be law.^g—Where a negotiable note was given by one in trust to assign to another, and the trust being broke, whereon a bill in chancery was filed; the maker of the note was not allowed to give evidence of the trust; as shewn in the case of *Ree* against *Nunes*, in the second section of our eighth chapter.

^d 3 New Abr. 610.

^e Strange, 516.

^f 3 New Abr. 608.

^g 2 Lev. 255.

C H A P: VII

- § 1. *Bills and Notes void when obtained for Money won at Play. Money lent to game with recoverable.*
- § 2. *A Bill of Exchange given upon an usurious Consideration void, even in the Hands of an Indorsee for valuable Consideration, without Notice of the Usury.*
- § 3. *Bills of Exchange lost. How the Loser shall act for recovering his Misfortune.*
- § 4. *Stealing Bills or Notes Felony; yet an innocent Indorsee is not to suffer Loss.*
- § 5. *Forgery Felony; but an innocent Holder of a Bill may recover thereon.*

§ I. **I**N the case of *Hussey* against *Jacob*, Mich. W. III. where the lord *Chandois* lost money at play to *Hussey*, and gave him a bill of exchange for it on *Jacob*, who accepted it, and afterwards refused to pay; and *Hussey* brought *assumpsit* against *Jacob* upon his acceptance. The defendant pleaded that the lord *Chandois* played at *hazard* with the plaintiff *Hussey*, and lost to him at one and the same time 150 l. and that for payment and security thereof, he drew this bill of exchange upon the defendant payable to the plaintiff, which the defendant accepted; and then he pleads the statute of gaming of 16 Car. II. c. 7, by which this bill of exchange, being given for the security of the said sum gained at play became void.

To which the plaintiff demurs, and after many arguments hereon the court gave judgment for the defendant. But held that if the plaintiff had indorsed

indorsed the bill over to a stranger *bona fide* upon good consideration, and the stranger being ignorant of the wrong, the statute could not have been pleaded against such an indorsee, but it could against him who was party to the wrong.

BUT now it is held otherwise, as in the case of *Bouyer against Hampton*, Trin. 14 Geo. II. where the defendant borrowed money of J. S. who lent it knowingly to game with, and assigned the note for a valuable consideration to the plaintiff, who had no notice; yet it was holden void by 9 Ann. c. 14^b. Of which we shall have a further demonstration in our next ensuing section, where the three cases contained in this are particularly alluded to.

IN the case of *Robinson and Bland*, Trin. 34 Geo. II. Sir John Bland gave a bill of exchange to Robinson, for 672 l. viz. 300 l. lent at the time and place of play, and 372 l. lost. The play was very fair, and there was not any imputation on Robinson's behaviour. He brought an action of *assumpsit* against Sir John's representative on the bill of exchange, and also for money lent. Upon a case reserved, the court held that he should not recover on the first count, the bill of exchange being void by 9 Ann. but they held as to the second count, though no action could be maintained for money won at gaming, the statute prohibiting any recovery upon a gaming consideration, yet as to the money lent, the statute only avoids the security, and not the contract, which when fair is good, and therefore gave judgment for the plaintiff for 300 l.—In the same case it was made a question, whether the plaintiff should recover any, and what interest. As to the first, the court said, that though the security were void,

^a 1 Salk. 344.

^b Str. 1155,

yet he had agreed to pay interest. As to the second, though the practice had been to stop interest at the bringing of the action, yet they held the plaintiff intitled to interest to the time of the judgment, and said, the court ought always to give interest to the verdict at least.*

§ II. A BILL of exchange given upon an usurious consideration is void, even in the hands of an indorsee for valuable consideration without notice of the usury; as in the case of *Lowe and others* against *Waller*. This was an action directed by an order of the court of Chancery, dated 18th of December, 1780, and tried before lord Mansfield at Guildhall, at the sitting after Hilary Term 21 Geo. III. Whereupon a case was made for the opinion of the court, and after divers arguments the court delivered their opinion thereon with great deliberation.

In the action the plaintiffs declared as indorsees of Harris and Stratton, to whom the bill was stated to have been indorsed by Lawton the drawer and payee. The defendant was the acceptor. The defence was, that the bill was given upon an usurious contract between Harris and Stratton, and the defendant. This was controverted by the plaintiffs; but, they also insisted, that the bill was indorsed to them for a valuable consideration, and without notice of the supposed usury, and it was argued, that although it should appear that the original transaction was usurious, still the defendant was answerable to them.

UPON the evidence the case was, that, Waller, commissioner of the stamp duties, had employed

* Law of Nisi Prius, 274.

the Lemon, a money-broker, to raise the sum of 100l. upon the bill in question. Harris and Stratton, hearing of this, sent their broker to Lemon, to enquire whether Waller wanted money, and he told the broker he believed he did, for, to his knowledge he had a bill to pay in a few days. The broker said his principal would advance 100l. in money, and 100l. in goods, but that the goods should be choice sorts, and he should not lose by them; that he should have them at the warehouse price. Lemon upon this, went and informed Waller, that Harris and Stratton's broker had been with him; and Waller asking him how they would deal, he told him what had passed, and that the broker had appointed him to go with Waller, to Harris and Stratton's warehouse, the next day. Waller, agreeable to this appointment, went, along with Lemon, the next day, and found Harris and Stratton at their warehouse; who made an apology to Waller for not having any money at the time, but only goods; and desired the business might be let alone for a few days. Lemon called several times after this, to get a day fixed, and told them, as he had mentioned before to their broker, that Waller wanted money, in order to pay several demands. In the course of about three weeks, Harris and Stratton said to him, that, if Waller would come the next day, they would give him 50l. and he and Waller accordingly went the next day. When they came, one of the partners went out, and returned in a little time, saying he could not get any money, but if Waller would take the whole in goods, he should have them directly. Waller agreed; and the goods, (hosiery ware) were sorted out by one Strutt, a broker who was present, and delivered to Waller, and at the same time, Waller delivered to Harris and Stratton the bill of exchange, and also an assignment of his salary, as a

collateral security in case the bill should not be paid when it should become due. Strutt and Lemon carried the goods to the shop of Elderton, an actioneer, who was a stranger to Waller, and who was to sell them, or advance the value. He desired two hours to make his calculation, and, at the end of that time, Lemon and Waller came to him, and he offered 120 l. for the goods, saying, it was the utmost they were worth. Waller took the 120 l. it being agreed, that, if they should sell for more, the balance should be accounted for by Elderton, and, if for less, that Waller should be answerable to him for the difference. Afterwards, Elderton delivered an account to Waller of the sale of the goods at 117 l. 2 s. 2 d. There was no evidence that the plaintiffs knew of the above transaction, or the circumstances under which the bill had been given.

THE question whether the transaction was a loan of money for more than 5 per cent. under colour of a sale of goods, was left to the jury. If they should be of opinion, that it was, it was agreed that a case should be reserved on the other point, being a matter of law.

IN summing up the jury, lord Mansfield told them, that the statute of usury [12 Ann. st. 2. c. 16] was made to protect men who act with their eyes open; to protect them against themselves. Upon this principle, it makes it penal for a man to take more than the fixed rate of interest, it being well known that a borrower in distress would agree to any terms. "No person shall take, directly or indirectly, for the loan of money, &c. above the value of 5 l. for the forbearance of 100 l. for any year, and so after that rate for a greater or less sum, or for a longer or shorter time." They were, therefore, to consider whether the transaction

between the defendant and Harris and Stratton was not, in truth, a loan of money, and the sale of goods a mere contrivance and evasion. The most usual form of usury was, his lordship said, a pretended sale of goods. He then stated the material parts of the evidence, and made some strong observations to shew, that it was not the intention of the parties to buy and sell, but to borrow and lend, and that the contract was, in truth, for a loan of money, though under the mask of a treaty for the sale of goods.

THE jury found the contract to be usurious, but, in point of law, the plaintiffs should be intitled to recover, they assessed the damages at 222 l. 10 s. being the amount of the bill with the interest due upon it.

HEREUPON the case was made for the opinion of the court, which, after setting forth the bill of exchange, bearing date the 27th of October, 1778, and payable in three months, with the indorsements in blank, of Lawton and of Harris and Stratton, stated; That the bill was given by Waller, the acceptor, to Harris and Stratton, upon an usurious contract, whereby more than legal interest was secured. That the plaintiffs took the bill from Harris and Stratton for a valuable consideration without notice of the usury.

BUT before this case was argued, Dunning in the Easter Term next ensuing the trial, obtained a rule to shew cause, why there should not be a new trial, upon the ground, that the original transaction was not a loan, but a sale of goods, and therefore, though it might be fraudulent, it was not within the meaning of the statute of Queen Anne.

A FEW days after this rule was obtained, the defendant's counsel shewed cause against the new trial, and after citing several cases, cited that of *Richards* against *Broten* [Cowp. Rep. 770.] which was much agitated and considered in the court of King's Bench, and finally decided in Trinity Term 18 Geo. III. and here the original treaty being for a loan, although it was disguised under the appearance of selling an annuity, it was decided to be within the meaning of the statute.

THE counsel for the plaintiffs, contended, that the transaction which although being a sale of goods at an exorbitant and iniquitous price, was still, only a sale, the price to be paid at a future day. That by the statutes 37 Hen. VIII. c. 9. and 13 Eliz. c. 8. it was made unlawful to sell merchandise or wares and repurchase them again within three months at a lower price; but it was to be inferred from those statutes that the legislature did not mean to extend the penalties against usury to other cases of sales, however oppressive, or unfair.

By lord Mansfield, chief justice: Before the statute of Hen. VIII. all interest on money lent was prohibited by the canon law, as it is now in roman catholic countries. This gave rise to many shifts and devices to evade the law. One, which was then the most common, was provided against by that statute; but the prohibition being confined to that particular sort of transactions, usurers were thereby, put upon other contrivances; and experience taught the legislature, in the more modern statutes, not to particularize specific modes of usury, because that only led to evasion, but to enact, generally, that no shift should enable a man to take more than the legal interest upon a loan. There-
fore

fore, the only question, in all cases like the present, is, what is the real substance of the transaction, not, what is the colour and form. This is one of the strongest cases of the sort I ever knew litigated. It is impossible to wink so hard, as not to see, that there was no idea between the parties of any thing but a loan of money. His lordship then recapitulated the striking parts of the evidence, and observed, that the whole complexion of the case shewed, that the only purpose of Harris and Stratton was, to contrive how to get more than legal interest. They first offered part in cash; then less, playing the defendant on, in order to increase his distress; and, at last, tempted him, by an offer to conclude the business immediately, if he would take the whole in goods; assigning to the last, as their reason for this, that they could not procure the money: They did not act as persons selling goods upon credit, to be paid for at a future day; but as lending on the security of the note and the assignment of the salary. The jury therefore had done perfectly right. — The whole court being clearly of the same opinion with the chief justice, the rule obtained by Dunning for a new trial was now discharged.

AND in Trinity Term ensuing, the case before mentioned to be made for the opinion of the court was argued; whereon the defendant's counsel cites the case of *Bowyer* against *Bampton* [in our next preceding section], wherein it was determined, that upon the construction of the statute of 9 Ann. c. 14. sect. 1. a promissory note, given for money knowingly lent to game with, is void in the hands of an indorsee for valuable consideration, and without notice. Yet the court held, that it would be making the note of some use to the lender, if he could pay his own debts with it; and that the indorsee would

would not be without remedy, for he might sue the indorser on his indorsement.

THE counsel for the plaintiffs contended that this statute and the statute 12 Anne, st. 2. c. 16. differ essentially as to the present question, and that both before and since the statute 12 Anne, usury was no bar to third persons not affected with notice. That the case of *Bowyer* against *Bampton*, was contrary to the other decisions, and not law. That the authority of this case is directly contrary to the doctrine laid down by lord Holt, in the case of *Hussey* against *Jacob* [in our next preceding section], and that Comyns in his digest, cites this case and adopts the position of lord Holt, as law. That a contrary decision would be highly inconvenient to trade. Bills circulate like money, but if it become necessary for every man to enquire into the original consideration, before he can take one with safety, their currency will entirely cease.

THE counsel for the defendant argues that wherever the acts against gaming and those against usury, differ, it will be found that the provisions against usury are the strongest. Thus, though the statute of 9 Ann. makes all securities given for money won at play, or lent to play with, void, it does not declare that the contract itself shall be void, and the prior act of 16 Car. II. c. 7. which says that contracts, and all securities for money lost at play, shall be utterly void, does not extend to money lent to play with. Therefore in the case of *Barjane* against *Warhinsley* [Hil. 19 Geo. II. 2 Strange 1149] it was held that an action would lie on the contract for money knowingly lent to play with; and in *Robinson* and *Bland* [in our next preceding section] the same distinction was made. But, by 12 Ann. st. 2. c. 16. not only the security or assurance, but the contract

contract itself is made void. This shews that the legislature was still more anxious to prevent usury than gaming. As to gaming, the case of *Bowyer* against *Bampton* is a direct and solemn authority. The decision was after two arguments; and Lee, chief justice, observed, that what lord Holt had said in *Hussey* against *Jacob*, was extrajudicial, and that he had seen a report, wherein notice was taken, that all the learned part of the bar wondered at it. It must be admitted, that the bill, in the present case, was void at first. Now, how can a thing void in its origin, be rendered valid by any thing done to it afterwards? If it were to be held, that it should appear on the face of the instrument, that more than 3 per cent. is to be paid, the statute would become almost a dead letter; for what usurer is so unskilful in his trade as to suffer the usury to appear on the face of the security? And how easy will it be for the lender to pay away bills, on which he himself could not recover, either *bonâ fide*, to persons to whom he is indebted, or colourably, to some secret partner in the business, but whose knowledge of the usury cannot be traced? It is said, it will be dangerous to trade, if third persons cannot recover. But this supposes that usurious contracts are very universal; and, if they are, it is highly proper they should receive a check of this sort. Besides what greater risk will there be than is run every day, when notes or bills are taken from women who may be under coverture, or from young persons who may be minors, unknown to the persons taking such notes or bills? If Harris and Stratton are solvent, the plaintiffs will not suffer; and it is the business of indorsees to satisfy themselves with respect to the solvency of the indorser.

THOSE arguments being on the 19th of June, the court took till the 26th to consider, and then lord Mansfield

Mansfield delivered their opinion to the following effect: We have considered this case very attentively, and, I own with a great leaning and wish on my part, that the law should turn out to be in favor of the plaintiffs. But the words of the act are too strong. Besides, we cannot get over the case on the statute against gaming, which stands on the same ground. This is one of those instances in which private must give way to publick convenience. It is less mischievous that the law should be as it is with respect to bills and notes, than other securities; because they are generally payable in a short time, so that the indorsee has an early opportunity of recurring to the indorser, if he cannot recover upon the bill.—The *Postea* to be delivered to the defendant. *

§ III. THE loss of a bill of exchange when left for acceptance must be provided for by the drawer with whom it was left, otherwise protest must immediately be made; as shewn in the eighth section of our fourth chapter. By statute 9 & 10 W. III. c. 17. if any inland bill of exchange for five pounds or upwards, shall be lost or miscarried, the drawer of the bill shall give another bill of the same tenor, security being given (if demanded) to indemnify him in case the bill so lost be found again.—Marius advises that as soon as the possessor of a bill loses it he should have recourse to the acceptor, and that the acceptor should be acquainted with its being lost in the presence of a notary and two witnesses, and caution be given him to pay it to none but those with his order.^b But if a stolen or lost bill be fairly passed in the course of trade the money is irrecoverable to the loser; as our next ensuing section will demonstrate.

* Doug. Rep. 736. 2 Edit. ^b *Lex Mercatoria Rediviva*, 476.

§ IV. STEAL

§ IV. STEALING of bills of exchange, notes, &c. is felony in the same degree, as if the offender had robbed the owner of so much money; as by statute 2 Geo. II. c. 25. s. 3. if any person shall steal or take by robbery any exchequer orders or tallies, intitling any other person to any annuity or share in any parliamentary fund, or any exchequer bills, bank notes, south-sea bonds, east-india bonds, dividends, warrants of the bank, south-sea company, east-india company, or any other company, bills of exchange, navy bills or debentures, goldsmiths notes for payment of money, or other bonds or warrants, bills or promissory notes for payment of money, being the property of any other person, notwithstanding any of the said particulars are termed in law *a chose in action*;^c it shall be deemed felony, of the same nature, and with or without benefit of clergy, as if the offender had stolen, &c. any other goods of like value with the money due on such orders, &c.—This statute is revived and made perpetual by 9 Geo. II. c. 18. s. 1.

Thus hath the legislature provided against theft. But if a bill of exchange with a blank indorsement be stolen and negotiated, an innocent indorsee shall recover upon it against the drawer, as in the case of *Peacock against Rhodes and another*, Easter, 21 Geo. III. in an action upon an inland bill of exchange, which was tried before Mr. justice Willes at the last spring assizes for Yorkshire, a verdict, by consent, was found for the plaintiff, subject to the opinion of the court on a special case stating the following facts,

THE bill was drawn at Halifax, on the 9th of August 1780, by the defendants, upon Smith, Payne, and Smith, payable to William Ingham,

^c Defined in the fourth section of our second chapter.

or

or order, 31 days after date, for value received. It was indorsed by William Ingham, and was presented by the plaintiff for acceptance and payment, but both were refused, of which due notice was given by the plaintiff to the defendants, and the money demanded of the defendants. The plaintiff, who was a mercer at Scarborough, received the bill from a man not known, who called himself William Brown, and, by that name, indorsed the bill to the plaintiff, of whom he bought cloth, and other articles in the way of the plaintiff's trade as a mercer, in his shop at Scarborough, and paid him that bill; the value whereof the plaintiff gave to the buyer in cloth and other articles, and cash, and small bills. The plaintiff did not know the defendants, but had before, in his shop, received bills drawn by them, which were duly paid. William Ingham, to whom the bill was payable, indorsed it; John Daltry received it from him, and indorsed it; Joseph Fisher received it from John Daltry; and it was stolen from Joseph Fisher, at York, (without any indorsement or transfer thereof by him,) along with other bills in his pocket-book, whereof his pocket was picked, before the plaintiff took it in payment as aforesaid. The plaintiff declared as indorsee of Ingham.

MR. WOOD, counsel for the plaintiff, hereon argued, that the bill was taken by Peacock, in the ordinary course of business, and there was no pretence that he had notice that it had been obtained unfairly. If he had, he admitted that he could not recover. A bill indorsed by the payee, is to be considered to all intents as cash, unless he chooses to restrain its currency, which he may do by a special indorsement [treated on c. 6. § 1. § 2.]. The very object in view, in making negotiable securities is that

that they may serve the purpose of cash. The case of *Miller* against *Race* [in c. 10. § 5.] the question there arose upon a bank note, established the principle just stated. If this bill had not been stolen, but lost, the owner might have maintained trover against the finder, but still the *bona fide* holder would have been intitled to recover upon it. This was determined, with respect to a note upon a banker payable to A. or bearer, in the case of *Grant* against *Vaughan* [in c. 6. § 6.]. Here the bill was indorsed blank, but that was the same thing in effect, as if it had been made payable to the bearer. A blank indorsement is an indorsement to all the world; to any body who shall happen to be the bearer. There was a case of *Francis* against *Mott*, directly in point to the present, tried before lord Mansfield two or three years ago: There a bill with blank indorsements had been picked out of the holder's pocket, at Manchester races, being offered in payment to a house at Manchester, who did not know the persons whose names appeared upon it, they sent to enquire about their credit, and finding them responsible, gave a valuable consideration for it, and sent it to their correspondent in London. He carried it to the drawee for acceptance, who detained it, and said it was stolen; upon which the house at Manchester brought an action against the drawer and the plaintiff recovered.

MR. FEARNLY, counsel for the defendants, arguing that the cases on this subject though all modern, yet all of them established a distinction between bank notes, or bankers cash notes payable to bearer, and indorseable bills or notes, cited a variety of cases, and at the conclusion of his argument says; the arguments from inconvenience are in favor of the defendants. No man is obliged to take a bill of exchange in payment. A trader should not,
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in prudence, take a bill, unless he knew the person from whom he received it. But, if the law were as contended for on the part of the plaintiff, the temptations to theft would be increased.

By lord Mansfield in delivering the opinion of the court: I am glad this question was saved, not from any difficulty there is in the case, but because it is important that general commercial points should be publicly decided. The holder of a bill of exchange, or promissory note, is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule was applied to bills and promissory notes, it would stop their currency. The law is settled, that a holder, coming fairly by a bill or note, has nothing to do with the original transaction between the parties, unless, perhaps, in the single case, (which is a hard one, but has been determined,) of a note for money won at play [heretofore treated on in our first section]. I see no difference between a note indorsed blank, and one payable to bearer [the latter whereof is treated on in c. VI. § 6.]. They both go by delivery, and possession proves property in both cases. The question of *mala fides* was for the consideration of the jury. The circumstances, that the buyer and also the drawers were strangers to the plaintiff, and that he took the bill for goods on which he had a profit, were grounds of suspicion, very fit for their consideration. But they have considered them, and have found it was received in the course of trade, and, therefore, the case is clear, and within the principle of all those Mr. Wood has cited, from that of *Miller* against *Rate*, downwards, to that determined by me at *Nisi prius*.—The *Postea* to be delivered to the plaintiff.

^d Doug. Rep. 633. 2 Edit.

§ V. FORGING bills of exchange or notes for money, indorsements, &c. is felony; as by statute 7 Geo. II. c. 25. If any person shall falsely make, forge or counterfeit, or cause to be falsely made, &c. or willingly assist in the false making, &c. any deed, will, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange or promissory note, &c. or any acquittance or receipt for money or goods, with intention to defraud any person, or shall utter or publish as true, any false, forged, or counterfeited deed, will, &c. with intention to defraud, &c. knowing the same to be false, &c. every such offender shall be guilty of felony without benefit of clergy. And by statute 7 Geo. II. c. 22. if any person shall falsely make, alter, forge or counterfeit, or willingly assist in the false making, &c. any acceptance of any bill of exchange, or the number or principal sum of any accountable receipt for any note, bill or other security, for money, or any warrant or order for payment of money or delivery of goods, with intention to defraud any person, or shall publish as true any false, &c. acceptance of any bill of exchange, or accountable receipt, warrant or order, with intention to defraud any person, knowing the same to be false, &c. every such person shall be guilty of felony without benefit of clergy.

By statute 18 Geo. III. c. 18. made to explain the act 7 Geo. II. c. 22. it is enacted, that if any person shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly act or assist in the false making, altering, forging, or counterfeiting any acceptance of any bill of exchange, or the number or principal sum of any accountable receipt for any note, bill or other security for payment

ment of money, or any warrant or order for payment of money, or delivery of goods, with intention to defraud any corporation whatsoever; or shall utter or publish, as true, any false, altered, forged, or counterfeited, acceptance of any bill of exchange, or accountable receipt for any note, bill or other security, for payment of money or delivery of goods, with intention to defraud any corporation whatsoever, knowing the same to be false, altered, forged, or counterfeited; every such person shall be guilty of felony, and shall suffer death as a felon without benefit of clergy.

Hence may be perceived how the legislature hath provided against wilful forgery; but an innocent holder of a forged bill of exchange shall recover against the acceptor who accepted the bill not knowing of the forgery. And in an action against the indorser the plaintiff need not prove the drawer's hand, for if it be a forged bill yet the indorser is liable.* An innocent holder of a forged bill of exchange, for which he has given a valuable consideration, shall recover against the acceptor who accepted it not knowing of the forgery, and drawer of a forged bill who accepts and pays, or pays it only, cannot recover back against the payee. In the case of *Price against Neale*, King's Bench, Mich. 3 Geo. III. in an action for money had and received for plaintiff's use. On *non assumpsit* pleaded verdict was given for plaintiff, on this special case.

A BILL of 40l. was drawn in the name of one Sutton, on the plaintiff, dated 22d November 1760, which in the course of trade was indorsed to the defendant, for a valuable consideration, and notice of it left at plaintiff's house, the day it became due

* Law of Nisi Prius, 273, Edit. 1785.

plaintiff sent his servant to take up the bill; who did so, and paid the money. A second bill was drawn 1st February 1761, on plaintiff, in the same name, which plaintiff accepted, and wrote an order thereon, for his banker to pay it; and being accepted, it was indorsed to the defendant for valuable consideration, and was paid by such order of the plaintiff. It appeared afterwards, that both bills were forged by one Lee, who was since hanged for other forgeries. The defendant acted innocently and *bona fide*, without the least privity or suspicion, and paid the full value of both bills. The question was, whether the plaintiff can recover back from the defendant, the money paid on the said bills or either of them.

THE counsel for the plaintiff gave up the accepted bill, on the authority of *Jenys and Fawler*, Trin. Geo. II. Strange 946. where it is held, that proof of forgery shall not be admitted on behalf of the acceptor of a bill, because it would hurt the negotiation of paper credit; unless a difference could be allowed, as to the admission of evidence on a trial, and the determining the law, after the fact is settled. As to the first bill, which was never accepted, they insisted the case was different. No credit had been given to that bill by an acceptance, therefore the same inconvenience would not follow.

By the court: This is an action for money had and received; the *Condictio Indebiti* in the Roman law: the most liberal species of actions on the case. If a man pays money *bona fide* due, after the statute of limitation has run upon it, or pays money fairly on at play; it will not lie, to recover it back. It will lie; if paid on a mistake, or without consideration,

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fideration, and the like. In the present case, nobody knows the hand of the drawer, but the plaintiff. The first bill is taken up by him ;—The second is accepted by him, before it comes to the defendant. The negligence in the plaintiff is greater, than can possibly be imputed to the defendant. Where the loss has fallen, there it must lie. One innocent man must not relieve himself by throwing it on another.—*Postea* delivered to the defendant, with judgment of nonsuit.

1 Black. Rep. 390.

C H A P. VIII.

1. *Of the Evidence on a Trial by Jury. What Proof is required. Who are, and who are not competent Witnesses; as with respect to infamous Persons and those who want the Use of their Reason.*
2. *Incompetent Witnesses; as Persons interested in the Event of the Cause.*
3. *A Person not a competent Witness to impeach a Security which he has given, although not interested in the Event of the Suit.*
4. *Of Evidence allowed on Part of Defendant in an Action against Drawer or Drawee.*
5. *Defendant may produce Evidence of an Illegal Consideration in an Action on a Note of Hand; and may bring Evidence that a Bill of Exchange was paid, although he had promised to pay it.*
6. *Proof required in a Writ of Inquiry before the Sheriff, on a Judgment by Default in an Action on a Promissory Note, and Bill of Exchange.*

THE evidence on a trial by jury, the nature whereof being of no small importance to be known to persons in general, as well as to those who may sue or be sued on a bill or note, concerning whom will be the subjects of our ensuing chapters, and preparatory to entering thereon, we have designed this; and in our first section thereof to treat, 1. On the evidence, and what proof is required. 2. On who are, and who are not, competent witnesses; as with respect to infamous persons, and those who want the use of their reason; but with respect to the incompetency of witnesses, as persons interested in the event of the cause,

the subject proposed for our next ensuing section, we may observe that it would be somewhat foreign to the design of this work to enter into the numberless niceties and distinctions of what is, or is not, legal evidence to a jury as to this point; wherefore we shall only select a few of the general heads and leading maxims relative hereto, as thereby to give the reader a conception of the law in this particular; and in our third section relate a case very lately solemnly argued and deliberately determined by the court of King's Bench, wherein this doctrine is fully discussed, and particularly where it relates to bills of exchange and promissory notes; and from thence proceed progressively with our subsequent sections.

§ I. AS to the evidence on a trial by jury, this is of two kinds, either written or *parol*, that is, by word of mouth. Written proofs, or evidence, are records and ancient deeds of thirty years standing, which prove themselves; but modern deeds, and other writings must be attested and verified by *parol* evidence of witnesses. And in order to prove a lease for years the deed or lease itself (if in being) must be produced at the trial, as must a bill of exchange, whereof mention is made in the second section of our fifth chapter.

WITH respect to proof, the one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required if possible to be had; but if not possible then the best evidence that can be had shall be allowed.

THE true meaning of this rule is, that no such evidence shall be brought, that *ex natura rei*, i. e. according to the nature of the thing, supposes still a greater

a greater evidence behind in the parties possession, or power; for such evidence is altogether insufficient and proves nothing, as it carries a presumption with it contrary to the intention for which it is produced. For if the other greater evidence did not make against the party, why did he not produce it to the court? As if a man offer a copy of a deed or will, where he ought to produce the original, this carries a presumption with it that there is something more in the deed or will that makes against the party, or else he would have produced it; and therefore a proof of a copy in this case is not evidence; but if he prove the original deed or will in the hands of the adverse party, or to be destroyed without his default, a copy will be admitted, because then such copy is the best evidence. The presumption of greater evidence behind in the party's possession being overturned by positive proof*.

POSITIVE proof is always required, where from the nature of the case it appears it might possibly have been had. But next to positive proof, circumstantial evidence, or the doctrine of presumptions must take place: for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact, is the proof of such circumstances, which either necessarily, or usually attend such facts; and these are called presumptions, which are only to be relied upon till the contrary be actually proved. Violent presumption is many times equal to full proof; for there those circumstances appear, which necessarily attend the fact. As if a landlord sues for rent due at Michaelmas 1754, and the tenant cannot prove the payment, but produces an acquittance for rent due at

* Law of Nisi Prius, 293. Edit. 1785.

a subsequent time in full of all demands, this is a violent presumption of his having paid the former rent, and is equivalent to full proof; for though the actual payment is not proved, yet the acquittance in full of all demands is proved, which could not be without such payment; and it therefore induces so forcible a presumption that no proof shall be admitted to the contrary.

PROBABLE presumption, arising from such circumstances as usually attend the fact, hath also its due weight: as if, in a suit for rent due 1754, the tenant proves the payment of the rent due in 1755, this will prevail to exonerate the tenant, unless it be clearly shewn that the rent of 1754, was retained for some special reason, or that there was some fraud or mistake: for otherwise it will be presumed to have been paid before that in 1755, as it is most usual to receive first the rents of longest standing.—Light, or rash, presumptions have no weight or validity at all.

ONE witness (if credible) is sufficient to evidence to a jury of any single fact; though, it is without doubt, the concurrence of two or more corroborate the proof; yet our law considers that there are many transactions to which only one person is privy; and therefore does not always demand the testimony of two, as the civil law universally requires. Yet here it should be observed that, although the doctrine of evidence upon pleas of the crown is, in most respects the same as that upon civil actions. There are however a few leading points wherein by several statutes and resolutions, a difference is made between civil and criminal evidence; for in all cases of high treason, petit treason, and misprision of treason, by statutes 1 Edw. VI. c. 12. and 5 & 6 Edw. VI. c. 11. two lawful witnesses

esses are required to convict a prisoner, unless he shall willingly and without violence confess the same. But in all other cases except treason one single evidence is sufficient for the King in criminal prosecutions.

To prove a person's hand writing in general cases, the witness should have gained his knowledge from having seen the party write, but under some circumstances that is not necessary; as where the hand-writing to be proved is of a person residing abroad, one who has frequently received letters from him in a course of correspondence would be admitted to prove it though he had never seen him write. Yet in case of high treason comparison of hands is not sufficient for the original foundation of an attainder, because there must be proof of some overt act; and writing is not an overt act; but herein it may be used as a circumstantial and confirming evidence, if the fact be otherwise proved; and in any other criminal prosecution it will be evidence the same as in a civil suit.

2. As to the competency of witnesses, all witnesses of whatsoever religion or country, that have the use of their reason, are to be received and examined, except such as are *infamous*, or such as are interested in the event of the cause, the latter of whom we purpose treating on in our second section of this chapter as already hinted.

INFAMOUS PERSONS, are such whose reputation is blemished by particular crimes which may render the party ever after unfit to be a witness, as treason, felony, and every *crimen falsi*, as perjury,

* Law of Nisi Prius, 236. Edit. 1785.

forgery, and the like : for where a man is convicted of those glaring crimes against the common principle of humanity and honesty, his oath is of no weight. The common punishment that marks the crime *falsi*, is being set in the pillory, and therefore, anciently they held that no man legally set in the pillory could be a witness ; but the rigour of this piece of law is reduced to reason ; for now it is holden, that unless a man be put in the pillory pro *crimine falsi*, as for perjury, forgery, or the like, it is no blemish to his attestation ; it is the crime, not the punishment, that makes the man infamous ; therefore, where a man was convicted of barrettry though he was only fined, the court held him incompetent ; so a person convicted of petit larceny is equally infamous with one convicted of grand larceny, for they are both felony.^a

BUT after a general statute pardon, a person attainted is a good witness ; and so it is after burning in the hand, which amounts to a statute pardon.—If one found guilty on an indictment for perjury at common law, be pardoned by the king, he will be a good witness, because the king has power to take off every part of the punishment ; but if a man be indicted of perjury on the statute, the king cannot pardon, for the king is divested of that prerogative by the express words of the statute : However it should be observed that the party

* Barrettry is the offence of frequently exciting and stirring up suits and quarrels between his Majesty's subjects, either at law or otherwise. The punishment for which in a common person is fine and imprisonment. If the person belongs to the profession of the law, the punishment

may be transportation. 1 Hawk. P. C. 243. 12 Geo. I. c. 29.

^a Law of Nisi Prius, 291. Edit. 1785.

* Attainted is the next step after conviction, as when the judge's sentence is passed. Law's Disposal, 146.

who would take advantage of those exceptions to a witness, must have a copy of the record of conviction ready to produce in court.^f

ANOTHER class that cannot be witnesses are those titled infidels, i. e. such as profess no religion, that can bind their consciences to speak the truth. But when any person professes a religion that will be a tie upon him, he shall be admitted as a witness, and sworn according to the ceremonies of his own religion; for it would be ridiculous to swear a witness upon the holy Evangelists, who did not believe those things to be sacred. The Jews are always sworn upon the old testament; Mahometans on the koran, those of the Gentou religion, according to the ceremonies of that religion, &c.^g—Excommunicated persons cannot be witnesses, because being excluded out of the church, they are supposed not to be under the influence of any religion. And the same law, it is said, holds place in relation to popish recusants.^h This opinion as to the latter is founded in the statute of 3 Ja. I. c. 5. which enacts, that every popish recusant convict shall stand to all intents and purposes, disabled, as a person lawfully excommunicated. But Mr. Serjeant Hawkins,ⁱ has very sensibly said, that this construction is over severe, as the purport of the statute is satisfied by the disability to bring any action.—Persons outlawed may certainly be witnesses, because they are punished in their own properties, and not in the loss of their reputation, and the outlawry has no manner of influence in their credibility.^k

^f Law of Nisi Prius, 293. church of England. Law's Disposal, 102.

^g Ibid. Edit. 1785.

^h Pleas of the Crown, 1 V. 23.

ⁱ Popish recusants are those 24.

^k Law of Nisi Prius, 294, 293.

As to persons excluded from being witnesses for want of the use of their reason, those are idiots, madmen and children; but with respect to children there seems to be no precise time fixed wherein they are excluded from giving evidence; but it will depend in a great measure on the sense and understanding of the child, as it shall appear on examination to the court. However, it seems to be settled, that a child under the age of ten, shall in no case be admitted; but after that age, if the child appear to have any notion of the obligation of an oath, after there has been a foundation laid by other witnesses; to induce a suspicion, the child shall be admitted to prove the fact. Doubtless the court will more readily admit such a child in the case of a personal injury, (such as rape) than on a question between other parties, and, perhaps, in such case would even admit the infant to be examined without oath; for certainly there is much more reason for the court to hear the relation of the child, than to receive it from second hands from those that heard it say so. In cases of facts done in secret, where the child is the party injured, the repelling their evidence intirely is, in some measure, denying them the protection of the law; yet the levity and want of experience in children, is undoubtedly a circumstance which goes greatly to their credit.¹

§ II. INCOMPETENT WITNESSES, as persons interested in the event of the cause. As in those the law of England, which permits, as shewn in the preceding section, one witness to be sufficient where no more are to be had; to avoid the temptations of perjury, lays it down as an inviolable rule, that *nemo testis esse debet in propria causa*.

¹ Law of Nisi Prius, 293. Edit. 1785.

e. no one ought to be a witness in his own case. And by the general rule of law, husband and wife cannot be admitted to be witnesses for each other, because their interests are absolutely the same; nor against each other; because contrary to the legal policy of marriage; but to this general rule there are some exceptions, particularly with respect to criminal prosecutions, wherein a party interested will be admitted in many instances.—no other relation is excluded being a witness, because no other is absolutely the same in interest.^a

IT is a general rule that no person interested in the question, can be a witness, and no counsel, attorney or other person intrusted with the secrets of the cause by the party himself, shall be compelled or perhaps allowed, to give evidence of such conversation or matters of privacy, as came to his knowledge by virtue of such trust or confidence; but he may be examined as to mere matters of fact, the execution of a deed or the like, which might have come to his knowledge without being intrusted in the cause.^a

THE strict notion of the objection to the competency of a witness is, what is termed a *voir dire*, when it is prayed upon a trial at law, that a witness may be sworn upon a *voir dire*; which is that he shall on his oath speak the *truth*, whether he shall gain or lose by the matter in controversy; and if it appears he is unconcerned, his testimony is allowed, otherwise not. In the case of *Turner and others* against *Pearle*, Easter, 27 Geo. III. on a motion in the court of King's Bench for a new trial, it was held that an objection to the competency of wit-

^a *Ibid.* 286, 287. ^a Law of Nisi Prius, 284; Edit. 1785.
witnesses.

nesses discovered after a trial, is not sufficient ground of itself for granting a new trial; and Justice Buller in delivering his opinion in this case. Anciently no doubt the rule was, that if there was any objection to the competency of the witness, it should be examined on the *voir dire*; and it was not till late after he was sworn in chief. In later times that rule has been a little relaxed; but the reason of doing so must be remembered. It is not that the rule is done away, or that it lets in objections which would otherwise have been shut out. It has been done principally for the convenience of the court, and it is for the furtherance of justice. The examination of a witness, to discover whether he is interested or not, is frequently to the same effect as his examination in chief: So that it saves time and is more convenient, to let him be sworn in chief in the first instance; and in case it should turn out that he is interested, it is then time enough to take the objection. But there never yet has been a case in which the party has been permitted *after trial* to avail himself of any objections, which were not made at the time of the examination.*

IN criminal prosecutions a party interested will be admitted a witness in many instances, as we have lately hinted.—In the case of *Rex against Moise*, Trin. 10 Geo. I. where the defendant was indicted for tearing a note whereby he promised to pay so much money to A. B. who was produced as a witness, and notwithstanding he was going to swear to set up his own demand, because, if convicted, the court would compel the defendant to give a new note, yet he was admitted.†

IN the case of *Rex against Nunes*, Easter 9 Geo. II. Mrs. L. gave a promissory negotiable note to

* Durnf. and East. Rep. 717.

† Strange, 595.

the defendant in trust to assign it to Mrs. T. who was indebted to Mrs. L. the defendant, broke his trust and negotiated the note; Mrs. L. having paid the note, brought a bill in chancery against the defendant, who in his answer denied the trust, upon which he was indicted for perjury, and lord Hardwicke refused to admit Mrs. L. to give evidence of the trust, and compared it to the case of forgery, where the person whose hand is forged is not admitted [mentioned in c. 7. § 5.], and said it differed from the case of usury, where the party is admitted to be an evidence, if the money is paid: the reason of which is being party to the crime, will not be permitted to have any remedy for it again.¹

In the case of *Abrahams* against *Burn*, King's Bench, Trin. 8 Geo. III. the court held that the person who borrowed money on a pawn was a good witness in an action for usury against the pawn-broker, though the payment of the money borrowed was proved by no other person but himself. For the judgment in this action could not be given in evidence in an action against him for money lent.—By lord Mansfield in delivering the opinion of the court in this case: Since the case of *Whiting* [1 Salk, 283.] and the case of *Nunes*, there has been great light thrown upon the distinction between the interest, which affects the competency of a witness; and influence which goes only to his credit: There have been the arguments and judgment in the case of *Rex* against *Bray*, mayor of Antagel.—Then came the case of the *East-India Company v. Gosslen*. There was also a case of *Baillie Wilson* (about the proof of a will) before the delegates.—The solemn discussion of these three cases

¹ Law of Nisi Prius, 288. Edit. 1785.

drew the line between interest, which goes to the competency; and influence which goes to the credit, more clearly than had before been understood.—It established a rule, “that where the matter was doubtful the objection should go to the credit.”—It established “that the question in a criminal prosecution being, the same with a civil cause in which the witness was interested, went generally to the credit; unless the judgment in the prosecution where he was a witness could be given in evidence in the cause where he was interested.” “I say generally,” because all rules of evidence admit of exceptions.*

IN the case of *Carter against Pearce*, Easter, 2 Geo. III. By justice Buller: In order to shew a witness interested, it is necessary to prove that he must derive a *certain* benefit from the determination of the cause either one way or the other.—In the case of *Walton and others assignees of Sutton against Shelley*, Trinity, 26 Geo. III. (which case will be large in our next ensuing section). By justice Buller in his discussion of this case: As to the question of *interest* it is much to be lamented that there is such confusion in the cases. I have always been of opinion, that the best rule to go by was to consider whether the witness was to derive any advantage from the event of the cause: but many cases tend strongly to contradict that idea. The material thing to be considered is, whether there is any distinction between the interest which the witness may have in the *issue of the cause*, and the *question* to be put to him. I am strongly inclined to think, that the most solid ground is to consider the objection to an interest in the event of the cause: but in doing that we must overturn many

* 4 Burr. Rep. 2251.

* Darnf. & East. Rep. 163.

ases; whereof particular mention will be made in our following section.

§ III. A PERSON is not a competent witness to impeach a security which he has given, although he is not interested in the event of the suit; as held in the above mentioned case of *Walton and others* against *Sbelley*, wherein are discussed a variety of points relative to the incompetency of witnesses, as persons interested in the event of the cause, and dissenters late resolutions of the courts hereon thoroughly considered.

UPON a motion to set aside the verdict, and grant a new trial in this cause, which was tried before Justice Buller at Guildhall, at the sittings after the last term, it was reported by him as follows:

THAT this was an action upon a bond given by the defendant to Sutton, to which there was a plea *non est factum*, and another of the statute of usury. It was proved by one witness for the defendant, that the bond was given in consideration of delivering to two promissory notes made by Mrs. Perry, payable to Birch or order, the one indorsed by Birch and Davenport Sedley, the other by Birch, Corbin, and Davenport Sedley, to Sutton. Davenport Sedley was then called by the defendant to prove that the consideration for the notes was usurious. But his evidence was objected to on two grounds; 1st. That he was called to invalidate a security which he had given; and that an indorser of a note, independent of any question of interest, could not be permitted to prove a note void, which he himself had indorsed; 2dly. That he was interested in the question which was meant to be put to him; for if

* Durnf. and East Rep. 296.

the notes were given for a usurious consideration he would never be liable to pay them; though by overturning the bond, they may be set up again. For these reasons the witness was rejected, as being incompetent.

THE motion to set aside the verdict, was made upon the ground that Davenport Sedley was a competent witness, and ought to have been admitted to prove the fact of the usury.

MINGAY, Baldwin, and Manley, shewed cause why the verdict should not be set aside, and argued upon two questions which had been made; 1st. Whether the witness was not interested in the question? 2^{dly}. Whether in any case a person shall be permitted to invalidate his own security? In arguing upon the first question, was instanced the principle upon which many persons are incapacitated from giving evidence, who are intirely uninterested in the event of the *cause*; yet being interested in the question which is put to them are therefore inadmissible, as in the case of commoners and underwriters.—On the second question it was argued that the courts have frequently laid it down as an invariable maxim, that no man shall be suffered to invalidate his own instrument; and if it were otherwise, the consequences would be very prejudicial to trade. In the case of *Abrahams and Bunn* [in our next preceding section], where the borrower of money was called to prove an usurious contract entered into by the defendant, who was a pawn-broker, though the competency of the witness was allowed because the pledge was returned, yet lord Mansfield said, “ had the defendant produced a security, or proved the pledge to have been remaining in his custody, it would have been a different consideration, whether the witness who was the
“ borrower

borrower of the money, could be examined to contradict this."—In an action by the drawee of bill of exchange against the drawer, the acceptor, who was insolvent, was not permitted to give evidence. *Mitchel v. Conaway*, [12. Vin. Abr. tit. evidence].—In the case of *Winlaw and Daniel* Sittings after Hil. 1786, at Westminster], which was an action of trover for three bills of exchange, Lord Mansfield merely said, that an indorser might be a witness to prove the property of the notes in A. or B. as he was equally responsible to either. In such cases the testimony of the indorser does not go to invalidate his own security, and therefore he is admissible. But where such testimony goes in discharge of the note, he is not a competent witness. As in the case of *Whittenbury and others* against *Jackman et uxorem* [and wife] executrix [Sittings after Easter 1786 at Guildhall], which was an action on a promissory note given by Wheeler the testator in his life time to one John Collier, and by him indorsed to the plaintiffs, for which he was made debtor in their books to nearly the amount of the note. The defendant proposed calling Collier to prove that the note had been satisfied by his having given two bills to the plaintiffs in discharge of it. The plaintiffs on the other hand contended, that the bills had been refused by them in discharge of the note. Buller, justice, refused to admit him upon two grounds, 1st, That he was interested in proving the note paid, for he thereby got rid of it: and as to his being liable for the book debt, that was a different transaction. 2dly, That he was called to invalidate his own security; for though his evidence did not tend to impeach the validity of the note, yet it tended to take away the remedy upon it by shewing it discharged.

It was not till after lord chief justice Lee's time, that the party who was interested in a note could

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give evidence concerning it in a criminal prosecution for forgery, perjury, or usury, where the note was the foundation of it. 2 Stra. 1043, 1104, 1221

BEARCROFT and Bower, counsel on the other side having closed their arguments, the court delivered their separate opinions.

LORD MANSFIELD, chief justice: The old cases upon the competency of witnesses, have gone upon very subtle grounds. But of late years the courts have endeavoured, as far as possible, consistent with those authorities, to let the objection go to the credit, rather than to the competency of a witness. In this case it seems to me that the witness had no interest in the present question, for either way he is discharged. If the bond is good, it puts an end to the notes, if bad, the same ground that vacates the bond, vacates the notes; therefore, in point of interest, I think there is no objection to his competency. But what strikes me is the rule of law founded on publick policy, which I take to be this; that no party who has signed a paper or deed shall ever be permitted to give testimony to invalidate that instrument which he hath so signed. And there is a sound reason for it; because every man who is a party to an instrument gives a credit to it. It is of consequence to mankind that no person should hang out false colours to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it. It is emphatically right in the case of notes; for in consequence of different statutes, two very hard cases have arisen. First, with respect to a gaming note, which though in the possession of a *bona fide* purchaser without notice, is void [as mentioned in c. 7. § 1]. It is similar in the case of usury: A note given for an usurious consideration, though in the hands of a fair

ir indorsee, is equally void [as shewn in c. 7. § 2.]. and therefore, whenever a man signs these instruments, he is always understood to say, that, to his knowledge, there is no legal objection whatever to them. The civil law says *nemo alligans suam turpitudinem est audiendus* [no man binding his own filthiness is to be heard]: Now apply this general maxim to the present case, with the distinction which has been taken. It has been argued at the bar, that this rule only holds where the action is brought upon the notes themselves, and therefore not relevant to this case. But I take the cases to be exactly the same. For the question on the validity of the bond involves in it the validity of the notes. The obligee of this bond trusted to the notes; he gave them up as a consideration for the bond; he trusted to the name of the indorser, and that he knew of no objection to the notes; and yet this same person was afterwards called to say that they were given for an usurious and illegal consideration; therefore, on that ground, I am of opinion that he was an incompetent witness.

JUSTICE WILLES: As to the incompetency of Bradley's evidence on the ground of interest, I am clear that he had none, or rather that he came to give evidence contrary to his interest; because by destroying the bond he sets up the notes. But the general rule is, that no man shall be permitted to invalidate, by his own testimony, an instrument to which he is a party; and there has been no case cited in which this rule has been impeached. There has indeed been an instance, where a man was suffered to explain his own deed. That was a case before me at the last assizes at Lancaster. Two brothers were joined in an assignment of a ship: and the question was, whether one of them had any interest in the vessel at the time of assignment. He was called to prove that he had none. His evidence was object-

ed to, on the ground that he ought not to be permitted to contradict his own deed ; but I was of opinion that he was a competent witness, because he came to swear against his own interest, that he had no property whatever in the vessel, and he explained it in this manner ; that the person, to whom the assignment was made, thought that this witness had an interest in the vessel, and would not accept the assignment unless he was joined in it : and the court of Common Pleas refused an application last term to set aside the verdict, and agreed with my direction.—It is better in general that objections of this kind should go to the credit, than to the competency of the witness. But the present question falls within the general rule, that no man shall be permitted to alledge his own turpitude in having given credit to a false and illegal security.

JUSTICE ASHHURST : The general rule is, that where a man is not interested in the event, he shall be a competent witness, though he may have a bias upon his mind with regard to the subject matter. As if a person bring two several actions against two defendants for the same battery ; in the action against one the other may be a witness, because he is not interested in the event. Any objections to such testimony should go to the credit rather than to the competency of the witness : therefore, if the present objection had rested solely on the question of interest, I should have been of opinion that Selley was a good witness. But he is inadmissible on another ground, that no man shall be permitted to invalidate his own act ; and here he has been a party to the fraud by affixing his name to the notes and giving them a sanction ; and having done that he shall not be admitted upon any account to say that those notes were void.

JUSTICE

JUSTICE BULLER: Two grounds of objection have been taken. The first steers clear of interest in the event of the cause; and I have always understood it to be a settled principle, that no man shall be permitted to invalidate his own act. A distinction has been attempted to be made between the present case, and an action on the notes themselves; but there is no foundation for such a distinction. For, if an action be brought on a note against the drawer, an indorser cannot be called as a witness for him, though he is not interested in that cause; and if a verdict be given against the drawer, and satisfaction obtained from him, the indorser is discharged. In that case it is his interest to charge the drawer, therefore there is no difference between an action upon the notes against the drawer, and the present action upon the bond. But the ground of objection has always been, that no man shall invalidate his own security.

As to the question of interest, it is much to be lamented that there is such confusion in the cases. I have always been of opinion, that the best rule to go by was to consider whether the witness was to derive any advantage from the event of the cause: but many cases tend strongly to contradict that idea. The material thing to be considered is, whether there is any distinction between the interest which the witness may have in the issue of the cause, and the question to be put to him: I am strongly inclined to think that the most solid ground is to confine the objection to an interest in the event of the cause; but in doing that we must overturn many cases. As in the case of commoners; if the issue be on a right of common, which depends on a custom pervading the whole manor, the evidence of a commoner is not admissible, because, as it depends upon a custom, the record in that action would be

evidence in a subsequent action brought by that very witness to try the same right: therefore there is a good reason for not receiving his testimony in such case. But the same reason does not hold where common is claimed by prescription in right of a particular estate; because it does not follow, if A. has a prescriptive right of common belonging to his estate, that B. who has another estate in the same manor, must have the same right; neither would the judgment for A. be evidence for B. and yet there are cases, which lay it down as a general rule, that one commoner is in no case a witness for another.

THEN in the case of policies of insurance, it has been held, that one under-writer cannot be a witness for another. *Ridout and Johnson*, East. 11 Ann. And the *East-India Company* and *Gosling*, Mich. 16 Geo. II. before Lee, chief justice, [Law of Nisi Prius, 283.]

IN these cases if the evidence offered tends to invalidate and destroy the instrument itself, that may be a reason for rejecting such testimony; but where such evidence is offered for any other purpose, there does not seem to be any good reason why it should not be received; for that verdict could not be given in evidence in another action upon the same policy against the witness or another under-writer. The cases on this subject, which have staggered me most, are two later ones in this court, by the names of *French v. Backhouse* and *French v. Foulston*, E. 11 Geo. III. [5 Burr. Rep. 2727.] Those were two distinct actions of covenant brought against two part owners of a ship by the husband of her, who had been appointed to that office by a deed executed by all the joint owners, by which deed they empowered him generally to advance or lend money,

&c.

&c. The husband of the ship insured for all the owners, and brought separate actions against two of them. They were each of them charged for the amount of the whole sum paid. It was there agreed, that the direction to insure given by one part-owner, did not bind the rest. And in the first action against Backhouse, Mr. Dunning offered to call the other part-owner, and insisted that he was a competent witness, because he was not interested in the event of that suit; for that each of the two causes was to stand on its own evidence: but he was rejected by lord Mansfield, as an incompetent witness; and the court, upon motion for a new trial, were afterwards of that opinion. There the second defendant was certainly not interested to support the defence in the first cause; for if the plaintiff had recovered in that, the second defendant who was offered as the witness could not have been charged with any part of the damages recovered in the first action.

THEREFORE, if there is any difference between an interest in the question, and an interest in the event of the cause, and an interest in the question disables a witness, I think these cases prove that this witness was incompetent; for the question put to him was upon the validity of the notes. How or in what manner such evidence was to bear upon the case was material for further consideration, and further evidence in the progress of it; and the witness could not tell how the cause would turn out, or what effect his testimony might produce.—Hereon the rule was discharged.^b

§ IV. CONCERNING evidence allowed on part of defendant in an action against drawer or drawee.

^b Durnf. & East. Rep, 296.

In the case of *Collet and Griffiths*, Hill. 2 Geo. II. at Guildhall; in an action against the indorser, Lord Raymond would not allow the defendant to give in evidence, that the plaintiff desired him to indorse the note to enable him to bring an action against the drawer, but declared he would not sue the defendant. But where the action was brought by the payee against the drawer, the defendant was let in to shew it was delivered as an escrow, viz. as a reward in case he procured the defendant to be restored to an office, which it being proved he did not effect, there was a verdict for the defendant. And it seems a reasonable distinction which has been taken between an action between the parties themselves, in which case evidence may be given to impeach the promise; and an action by or against a third person, viz. an indorsee or an acceptor.^a

§ V. THAT defendant may produce evidence of an illegal consideration in an action on a note of hand is shewn at large in the fifth section of our third chapter; and he may bring evidence that a bill of exchange was paid, although he had promised to pay it, and so avoid the promise by shewing no consideration for the bill; as held in the case of *Elmes against Wills*, Common Pleas, Trin. 28 Geo. III. where a rule was obtained to shew cause why there should not be a new trial, the cause having been tried before Mr. justice Gould at Hertford assizes in the summer 1787. And it appeared in evidence that the plaintiff and defendant had mutual dealings together, and had applied to one Rawnsley to settle their accounts, who had accordingly adjusted all matters in dispute except the bill on which the action was brought. This the defendant said he could prove he had paid. Upon which, it was

^c Law of Nisi Prius, 274. Edit. 1785.

^d *Ibid.* Cites *Snelling and Briggs* at Reading, 1741.

agreed

agreed that the bill should be deposited in the hands of Rawnsley, and if the defendant brought proof of the payment within a month, the bill should be delivered up to him, if not he promised to pay it to the plaintiff. No proof being brought by the defendant within the month, the bill was delivered to the plaintiff, who brought his action upon it.

THE counsel for the defendant offered to give in evidence, that the original debt was paid for which the bill was given, and that the defendant could not within the month find the witness by whom it might have been proved according to the agreement, he having absconded to avoid an arrest. This evidence the judge refused to admit, holding that the defendant was bound by his agreement to pay the bill if he did not bring the necessary proof within the month.

IN Michaelmas term last, a rule was obtained to show cause why a new trial should not be granted, on the ground that this evidence ought to have been admitted.—Lawrence, serjeant, having shewed cause against the rule, and Rooke, serjeant, argued in favour of it.

THIS term, justice Gould after stating the facts, said, that he was of opinion at the trial, that the plaintiff had a right to prove the special promise of the defendant, under the general count of *infirmul computassent* laid in the declaration, on the authority of Buller's *Nisi Prius*, p. 139, and that the promise not being performed, was intitled to recover, the defendant not being at liberty to bring evidence in excuse for his non-performance, where the undertaking was peremptory. That such an undertaking was upon sufficient consideration, he cited the case of *Amie v. Andrews*, 1 Mod. 166. and

Knight

Knight against Rusworth, Cro. Eliz. 469.—The rest of the court were of opinion, that though there was a new promise on a special agreement, and though under a general count of *in simul computasset* such a promise might be given in evidence, yet in the present instance, it was to pay an old debt, the condition not being performed, it was to be considered only as evidence of the debt, and the effect of it was to shew, that the plaintiff had *prima facie*, only a right to recover. The defendant therefore ought to have been admitted to prove that the debt was discharged, because by so doing, he would avoid the promise by shewing there was no consideration for it.—Hereon the rule was made absolute for a new trial.*

§ VI. IN a writ of inquiry before the sheriff, on a judgment by default in an action on a promissory note, the plaintiff must prove his note the same, as if the defendant had pleaded *non-assumpsit*, though in debt on bond and judgment by default it is otherwise.—Yet in *Bevis against Lindfell*, Hil. 14 Geo. II. the court of King's Bench held, that on executing a writ of enquiry on judgment by default in *assumpsit* upon a promissory note, it was not necessary to produce the subscribing witness for the note being set out in the declaration is admitted, and the only use of producing it is to shew whether any money is indorsed to be paid upon it, it must therefore be proved to be his note, which may be by proving his hand.†

In the case of *Tbelluson against Fletcher*, Hil. 22 Geo. III. it was said by justice Buller, among other things relative to a writ of inquiry, "That in actions upon a bill of exchange, or a promissory

* H. Blackstone's Rep. 64. † Law of Nisi Prius, 278. Edit 1789.

note, nothing but the instrument is to be proved before the jury, the sum being thereby ascertained."* And the reporter in a note, as with respect to nothing but the instrument is to be proved before the jury, says, "In such cases, although the note or bill is stated, and the execution of it averred, in the declaration, it has been settled in many instances, that it must be produced before the inquiry jury."

* Doug. Rep. 315, 2 Edit.

CHAP.

C H A P. IX.

- § 1. *Demand of Payment on the Drawer by Indorsee not necessary previous to suing Acceptor of a Bill; but must be made on the Acceptor previous to suing the Drawer or Indorser, and on Maker of a Promissory Note previous to suing the Indorser.*
- § 2. *Before an action be brought against the Drawer of a Bill, Notice should be given him of Refusal, Insolvency, or absconding, of the Drawee.*
- § 3. *Of holding Bills or Notes after being dishonoured, and giving Notice to the Drawer or Indorser.*
- § 4. *Although Party become Bankrupt, Notice of Non-payment should be given. Notice to the Drawer of a Bill of Exchange being dishonoured not requisite if Drawee had no Effects of his in Hand. Of accepting a Bill in Satisfaction of a former Debt.*
5. *If Indorsee of a Bill not due, present it for Acceptance which is refused, and delay giving Notice to his Indorser, the Indorser will be discharged.*

THE subjects of our next preceding chapter being, as there hinted, designed as preparatory to our proceeding hereon, and on the next ensuing and as the principal matters contained in this chapter, will be on the demand and notice requisite to be made and given previous to suing on a bill or note, and the subjects of our next ensuing, or suing the parties; whereon a retrospect to our foregoing chapter, it is observable may be necessary to be had, in order to discover what is sufficient proof for the different points herein after treated on, and which may be required to be proved on trial.

§ I. DEMAND of payment on the drawer by indorsee, is not necessary previous to suing acceptor of a bill ; but must be made on the acceptor previous to suing the drawer or indorser, and on maker of a promissory note previous to suing the indorser ; as in the case of *Heylins and others against Adamson*, King's Bench, Mich. 32 Geo. II. In this case, an action was brought against the defendant as indorser of an inland bill of exchange for 100*l.* drawn at forty days sight, by one Carrick upon one Dodd, in favour of the defendant, who indorsed it to the plaintiffs. Dodd accepted the bill, but did not pay it, upon which it was protested by the plaintiffs. All which was proved to the jury ; but it did not appear that the drawer had notice of the non-payment, before this action was brought, or that any application was first made to him for payment : And this matter being objected by the defendant's counsel, and they insisting that for want of such notice or demand, or due diligence used, for that purpose, the plaintiffs must be non-suited, the jury gave a verdict for the plaintiffs in 100*l.* damages and 40*s.* costs, subject to the opinion of the court. And as this was a point unsettled, and many contradictory opinions thereon, the court took time to consider of it ; and this term were unanimously of opinion that, in the present case, it was not necessary to demand the money from the drawer, or to use any diligence for that purpose, or to give him notice of non-payment by the drawee. That a bill of exchange was an order or command given by the drawer on or to the drawee (who has, or is supposed to have, effects of the drawer in his hands) to pay a sum of money to a third person ; that when the bill is accepted, the drawee is become the principal debtor, and the drawer is liable only in default of the drawee, and due diligence be not used to get the money, from

from the acceptor or drawee, and notice of his non-payment given in convenient time to the drawer, the drawer shall not be liable; for if it should be otherwise, and the person upon whom the bill was drawn should become insolvent without such due diligence used by the payee, or person to whom the bill is payable, to demand payment from the drawee, or without his giving the drawer timely notice of the non-payment, then would the drawer unreasonably suffer through the *laches* of the payee; having no intimation to call in his effects before the drawee became insolvent.

THAT when a bill of exchange is indorsed by the person to whom it is made payable, it is become a new bill, and the indorser is in the place of the drawer; and therefore if the indorsee uses due diligence to get the money from the acceptor, and is refused payment, then the indorser, who has put himself in the place of the original drawer, upon notice of such non-payment, is become liable immediately, but not otherwise; in like manner, and for the same reason that the original drawer would have been; in the like case, had there been no indorsement: And the indorsee is not obliged to make any demand upon the drawer, or to give him any notice; for he does not trust the drawer (who may not, perhaps be known to him). The indorser is his debtor, and not barely a warrantor or security for the payment of the money.

THAT there was no difference between foreign and inland bills of exchange, except in the degree of the conveniency; and as to foreign bills, this matter has been determined before in *Strange* 441. The reason of the judgment there given was for the inconveniencies that would ensue to commerce in general, from the discredit it would bring upon bills

of exchange to be thus clogged with a necessity of giving such notice, and making a demand on the original drawer. Now every inconvenience attending a foreign bill holds to a great degree, though not equally in respect to an inland bill, if a person should be obliged, perhaps, in several remote parts of the kingdom, to enquire after and find out the drawer; and therefore in this case it was not necessary to prove any enquiry after, or demand upon the original drawer, or any notice of the non-payment to him.

THAT what gave rise to the seeming contrariety of opinions upon this point, is the confused manner in which cases upon inland bills of exchange and promissory notes, are reported and blended together. There is a strong resemblance between a promissory note indorsed, and an inland bill of exchange, and the law should be settled on the analogy between them.—Whilst a promissory note remains in its original state without indorsement, it bears no resemblance to an inland bill of exchange; but when it is indorsed to a third person the similitude begins; for then the maker of the note is in the same situation with the drawee or acceptor of the bill of exchange; and the indorsee of either bill or note must demand the money from the acceptor of the bill, or maker of the note, before an action can be brought against the indorser; that this was determined with respect to the maker of a note, in the court of Common Pleas, as cited in Strange, 1087; that where *Holt* said in *Oake's* case, reported in *lord Raymond*, 443, *that the indorsee must demand or endeavour to demand the money from the maker of the note, before he can sue the indorser*; and added further, *The same law if the bill was drawn upon any other person payable to O. or order.*" He does not mean that the demand must be first made on the

the drawer of the bill of exchange, before the indorsee can sue the indorser, but upon the person who is in the same situation with the drawer (or maker) of the promissory note, who is the real debtor, and this is the acceptor of the bill of exchange.

THAT this opinion of Holt, which thus construed, agreed with the present opinion of the court was misunderstood and confused in *Salkeld*, 122 (which is manifestly a wrong collection from Holt's opinion in *Oake's case*) where it is said that the indorsee of a bill of exchange must, in an action against the indorser, prove, "that he demanded the money from the drawer, or him upon whom it is drawn, and that he refused to pay it, or else that he sought him and could not find him;" that there was the same mistake in 12 Mod. 244; and that the confused and short notes taken of these and other cases, were the true occasion of all the contraries of opinions to this point.

AND that upon the whole, in an action by the indorsee of an inland bill of exchange against the indorser, he must prove a demand, or due diligence used to make it, upon the acceptor, or person upon whom the bill was drawn: And in an action by the indorsee of a promissory note against the indorser, he must prove a demand made, or due diligence used to make it, from the maker of the note.

§ II. BEFORE an action be brought against the drawer of a bill of exchange, notice should be given him of refusal, insolvency, or absconding, of the drawee; as in the case of *Dagglish* against *Weatherby* Hil. 11 Geo. III. *Weatherby* drew three bills of exchange

change on Morley, payable to Dagglisb. Two were
 tendered for payment, and refused. No account
 was given of the third. Dagglisb brought his action
 against the drawer, for the value: But, not
 proving any notice given to the drawer of non-pay-
 ment, or that the drawee was insolvent, or had ab-
 andoned, chief justice De Grey, at *Nisi Prius*, non-
 suited the plaintiff. The court was afterwards
 moved by Johnson, counsel for the plaintiff, to set
 aside the nonsuit, and for a new trial; because no
 such notice to the drawer is necessary; but after-
 wards, despairing to support his motion, and hav-
 ing consented to be nonsuited at the trial, the rule
 was (without argument) discharged.

§ III. AS concerning holding bills and notes after
 being dishonored, and giving notice to the drawer
 or indorser, there hath been much litigation; we
 shall here mention the case of *Truby and Delafountain*,
Mich. 2 Geo. II. and then relate the case of
Andal and others against Brown, *Easter, 26 Geo. III.*
 which latter case is contained a variety of learned
 observations hereon by all the judges of the court
 King's Bench; and from whence may be per-
 ceived that the holder of a bill should not give time
 to the acceptor thereof; nor the holder of a note
 to the maker. What is held reasonable notice of
 non-payment by the maker of a promissory note,
 or acceptor of a bill of exchange; and that notice
 must come from the holder, who should shew his
 intention not to give credit.

In the case of *Truby and Delafountain*. By lord
 Raymond: The indorsee must give reasonable no-
 tice to the indorser in convenient time upon default
 of payment by the drawer; but proof of making

2 Black. Rep. 747.

enquiry after defendant, who could not be found, will be sufficient to excuse the giving such notice, unless the defendant can prove he was to be found.

In the case of *Tindal and others* against *Brown*. The plaintiffs were indorsees of a promissory note indorsed by Brown. The cause first came on for trial at the sittings after Easter Term 1785, before lord Mansfield at Guildhall, when the jury found a verdict for the plaintiffs.—On a motion for a new trial in last Trinity term, the facts appeared to be these, that on the 21st of August, 1784, the note in question was made by one Donaldson for 38*l.* payable six weeks after date; that on the 5th of October, 1784, the day on which the note became due, allowing for the three days grace, one Howell (the plaintiff's clerk) called on Donaldson at ten o'clock the morning, and not finding him at home, he left word that the note was due, and desiring Donaldson would send for it at his master's, where it lay, and take it up; that on the next day, Wednesday the 6th of October, he called again on Donaldson, who told him he would take it up the next day within the banking hours, which were from nine to four o'clock; that the note not being taken up that day, he called again on Donaldson on Thursday the 7th, and not finding him at home, he was sent to the defendant Brown, to tender the note, who refused to pay it, saying the plaintiffs had made it their own. Donaldson proved at the trial, that immediately on his parting with Howell, on Wednesday the 6th, he went to Brown's house, and not finding him at home, he left a message with his wife, that the note was due, that he (Donaldson) could not pay it, and desiring that Brown would take it up, adding that he would

* Law of Nisi Prius, 273. Edit. 1785.

ke it good to him.—That all the parties lived
Bristol, within twenty minutes walk of each
er.

AFTER argument by Lee and Morgan for the
intiffs, and Cowper and Baldwin for the de-
fendants, the court delivered their opinions to the
following effect.

LORD MANSFIELD: On full consideration, I am
now decidedly of opinion that there ought to be a
trial. It is of great consequence that this
question should be settled. Certainty and diligence
of the utmost importance in mercantile trans-
actions. It is extremely clear, that the holder of
bill, when dishonoured by the acceptor, must give
reasonable notice to the drawer or indorser. What
reasonable notice is partly a question of fact, and
partly a question of law. It may depend in some
measure on facts, such as the distance at which
the parties live from each other, the course of the
bill, &c. But, wherever a rule can be laid down
with respect to this reasonableness, that should be
decided by the court, and adhered to by every one
for the sake of certainty. I cannot form to myself
an idea of the ground on which the jury went in
giving this verdict. Did they conceive the rule
to be that the holder might delay giving notice for
so many days, or what other time did they mean to
allow him? Here an earlier notice might certainly
have been given, as all the parties lived within
twenty minutes walk of each other. The bill was
dishonoured on the fifth, the clerk saw the maker
on the 6th, and gave him time during the bank-
ing hours of that day; and the plaintiffs did not
act at four that afternoon, but waited till the next
day. It has been held, that where the party liable
does not live in the same place, the holder must

write by the next post after the bill is dishonoured. It was well observed by the counsel, that the judges were obstinate in the case of *Metcalf and Hall*, [King's Bench, Trin. 22 Geo. III.] where they struggled so hard, in spite of the opinion of the court, to narrow the rule, that they held you may in certain cases demand payment on a bank draft within an hour. Here the struggle is to give a greater latitude than is necessary. It was once doubted whether notice within fourteen days was not sufficient. For the sake of diligence and certainty, I am of opinion there should be a new trial.

JUSTICE WILLES: I agree that there ought to be a new trial. New credit was given to the maker on the 7th; the plaintiff's clerk went first to Donaldson to demand the bill of him, and after that he sent it to the defendant. As to the notice, I cannot consider the notice given by the maker equal to that given by the indorser. The plaintiffs have not acted with legal diligence.

JUSTICE ASHHURST: It is of dangerous consequence to lay it down as a general rule, that a jury should judge of the reasonableness of time. It ought to be settled as a question of law. If a jury were to determine this question in all cases, it would be productive of endless uncertainty. The next day at the most is as long as is necessary in a case circumstanced like this. If the parties live at a small distance, this is sufficient time: if at a greater, they should write by the next post. Notice means something more than knowledge: because it is competent to the holder to give credit to the maker. It is not enough to say that the maker does not intend to pay, but that he (the holder) does not intend to give credit. In the present case there is

notice

notice; for the party ought to know whether the holder intends to give credit to the maker, or whether he intends to resort to the indorser.

JUSTICE BULLER: The numerous cases on this subject reflect great discredit on the courts of Westminster. They do infinite mischief in the mercantile world; and this evil can only be remedied by doing what the court wished to do in the case *Metcalf and Hall*; by considering the reasonableness of time as a question of law, and not of fact. Whether the post goes out this or that day, at what time, &c. are matters of fact; but when those facts are established, it then becomes a question of law whether those facts, what notice shall be reasonable.

As to giving time; the holder does it at his peril. That circumstance alone would be sufficient to decide this case. For in no case has it been determined, that the indorser is liable after the holder of the note has given time to the maker.

With respect to notice, I concur in the opinion which has been given by the court, and particularly for the reason given by my brother Ashurst. The purpose of giving notice is not merely that the indorser should know the note is not paid, but that he is chargeable only in a secondary degree; to render him liable, you must shew that the holder looked to him for payment, and gave him notice that he did so. A case might easily be made, where the indorser might have notice from the holder, and yet would not be liable; as in the present case, the holder had written a letter to the indorser, containing the circumstances which have been given in evidence, the indorser would have been discharged; because it would have amounted to this, "the note made by Donaldson, and

"indorsed by you, is not paid, and I have given credit to Donaldson till to-morrow." Though there is no prescribed form of this kind of note, yet it must import that the holder looks on the indorser as liable, and expects payment from him, that he may have his remedy over by an early application. Then it becomes his business to take up the note. But notice of having given credit to the maker will discharge the indorser. The notice by another person to the indorser can never be sufficient; but must proceed from the holder himself.

THE rule for a new trial being made absolute. This cause was heard a second time before Justice Buller at the sittings at Guildhall after last Hilary term, when in addition to the evidence given on the former trial, one Weeks, the defendant's attorney was called, who swore, that in a conversation which he held with Donaldson, on Thursday the 7th of October, concerning the note in question, Donaldson told him he was that moment come from Mrs. Brown's, where he had left a message with Mrs. Brown, desiring her husband to take up the note, and that the reason why he was so exact as to the particular day, and the expression made use of by Donaldson, was because he kept a minute of all his transactions; that his minute was confirmed in respect by his memory; and besides that, the meeting between the parties before the action was brought, this fact was admitted on both sides. This jury, which was a special one, likewise found for the plaintiffs.

COWPER having moved this term for a new trial on the ground that this was a verdict against law. Erskine, for the plaintiffs, shewed cause, and admitted that it was not now to be disputed that it should be considered to be a reasonable time, &c.

question of law; but contended, that in this case the plaintiffs had used due diligence, and had given the defendant notice within a reasonable time. That Donaldson ought to be considered as the agent of the plaintiffs for the purpose of giving notice to the defendant. That there was a contradiction as to the time when this notice was first given to the defendant, whether on the 6th or 7th of October, which contradiction arose from the testimony of Weeks, who was not produced at the former trial, which circumstance might have afforded the jury some room for suspicion; but this was a point proper for the determination of the jury, who had decided it. That, at all events, the court should be extremely cautious in granting a third trial; particularly as the sum in litigation was so small. That in *Metcalf and Hall*, which involved a similar question, the court had refused to grant a third trial.

THE counsel on the other side were stopped by the court, who referred to their former decision, and added, that even if the application had been made to the defendant on the 6th, it would have been too late, because the plaintiffs had given credit to the drawer. That though it was true in general, that the court would refuse to grant a new trial when the sum in litigation was small, yet that rule did not apply where a verdict had been given against law. That the reason why the court refused granting a third trial in the case of *Metcalf and Hall*, was because the plaintiff had proved his debt under a commission of bankrupt, which had issued against the drawees of the bill between the time of the verdict and the motion for a new trial.—Rule absolute.

§ IV. ALTHOUGH a party become bankrupt notice should be given of a bill being dishonoured.

* Durnf. and East Rep. 167.

In the case of *Bickerdike and another, assignees of Reichert & Bankrupt* against *Bollman*, in King's Bench, Mich. 27 Geo. III. The counsel observed in the argument hereof, that it was said by Lee, in arguing the case of *Russel and Langstaffe* [in c. 6. § 4.] and not denied by the court, that it had been frequently ruled by lord Mansfield at Guildhall, that it is no excuse for not demanding payment on a note or bill, or for not giving notice of non-payment, that the maker or acceptor is become a bankrupt as many ways may remain of obtaining payment by the assistance of friends or otherwise.⁴

As concerning notice to the drawer of his bill on exchange being dishonored, not requisite, if drawer had no effects of his in hand. By justice Ashurst in delivering his opinion in the above mentioned case of *Bickerdike* against *Bollman*: As to the general rule; it has never been disputed that the want of notice to the drawer after the dishonour of a bill is tantamount to payment by him; but that rule is not without exceptions. Notice is not necessary to be given where the drawer has no effects in the hands of the drawee: for it is a fraud in itself, and if that can be proved, the notice may be dispensed with. And by justice Buller in delivering his opinion in this case: One point to be considered is, whether under certain circumstances it was necessary to give notice within as short a time as could conveniently be done, that a bill was neither accepted nor paid. On the second trial of the cause of *Tindal and Brown* [the case in the next preceding section], before me at Guildhall, the jury told me they found their verdict for the plaintiff on the ground that it had not appeared from the evidence that any injury had arisen to the party for want of

⁴ Dursf. and East Rep. 408.

notice. In consequence of which, upon the subsequent trial, I told the jury that where a bill was accepted, it was *prima facie* evidence that there were effects of the drawer in the hands of the acceptor. The mistake of the jury on the former occasion had arisen from their taking it for granted that the drawer had not been injured by the want of notice, because he had not proved it, whereas that proof lay on the plaintiff to produce. And upon my mentioning this matter to the court, they thought that if there were no effects in the hands of the acceptor, that would vary the question very much, as the drawer could not be hurt. The law requires notice to be given for this reason, because it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if he has no effects in the other's hands, then he cannot be injured for want of notice. Soon after I sat on this bench I tried a cause at Guildhall, on a bill of exchange which was either drawn or accepted by a person residing in Holland, and a special jury, under my direction, found a verdict for the plaintiff, notwithstanding no notice had been given to the drawer of the bill's having been dishonored, because he had no effects in the hands of the person on whom the bill was drawn. That verdict never was objected to; and if it be proved on the part of the plaintiff that from the time the bill was drawn till the time it became due the drawee never had any effects of the drawer in his hands, I think notice to the drawer is not necessary; he must know whether he had effects in the hands of the drawee or not; and if he had none, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the non-

non-payment of the bill, or the want of notice that it has been dishonored.*

WITH respect to accepting a bill in satisfaction of a former debt. In the first section of our fifth chapter it is mentioned that by the statute of 3 & 4 Ann. it is enacted, that if any person accept a bill of exchange in satisfaction of any former debt, the same shall be esteemed, a full payment if he does not use his endeavour to get the same accepted and paid; and make his protest for non-acceptance or non-payment.—Where A. being indebted to B. indorsed a bill of exchange to him, and afterwards on *assumpsit* brought against him by B. gave it in evidence, that it had laid so long in his hands after it was made payable; but this was disallowed, because a bill shall never go in discharge of a precedent debt, except it be so agreed; though not applying for payment in a reasonable time, seems to be left to the jury as evidence of such agreement.†

§ V. IF indorsee of a bill not due, present it for acceptance which is refused, and delay giving notice to his indorser, the indorser will be discharged although a subsequent promise be made by him to pay the bill; as hath been determined in the case of *Blesard* against *Hirst and another*, King's Bench Mich. 11 Geo. III. and in the case of *Goodall and others*, against *Dolley*, Easter, 27 Geo. III. In the former of those cases was an action brought against the defendants, who are partners in trade, as indorsers of a bill of exchange. The defendants pleaded the general issue. And on the trial it appeared in evidence, that William Topham of Leeds, in

* Durnf. and East Rep. 405.

† Law of Nisi Prius, 153. B. 1785.

county of York, on the 8th day of March, 1769, drew a bill of exchange on Messrs. Klotz in London, bearing date the same day for 30l. payable six weeks after date to the defendants or order for value received; who indorsed it to the plaintiff. On the 18th March, the plaintiff, who resides at Bradford in Yorkshire, sent the bill to Lewis and Martin his correspondents in London; who received it on the 21st of March, and on that day or the next day after presented it to Messrs. Klotz on whom it was drawn, for acceptance, who refused to accept it. On the 22d of April, which was the day on which the bill became due, it was presented by Lewis and Martin, and protested for non-payment. That Topham the drawer, continued in credit till the 11th of April: Soon after which, a commission of bankrupt issued against him.—That no notice was given of the refusal to accept the bill: but on the 29th of April the plaintiff gave notice to the defendants that Messrs. Klotz had refused to pay the bill; and that it was returned with charges of protest. On the 2d of May one of the defendants called at the plaintiff's, in his way from his own house to Leeds; and told the plaintiff he would take up the bill as he came back:—but on his return he said, he had been advised that he was not bound to do it.—Plaintiff had a verdict for 30l. subject to the opinion of the court upon the question “Whether “under the circumstances of this case the plaintiff “is intitled to recover.”

AND this being brought before the court, the fact stated by the counsel was, that an inland bill of exchange was drawn by Topham upon Messrs. Klotz; and was indorsed by defendants to the plaintiff, who presented it for acceptance: It was refused to be accepted. The plaintiff kept it in his hands three weeks, without giving notice to the person

person from whom he received it, "that it had been refused to be accepted." Topham remained in good credit during these three weeks; and then failed before the time of payment came.—The question was, "Whether the plaintiff, the holder of the bill, could recover of the person from whom he received it; when he had thus neglected to give him notice of the refusal to accept it." And after the counsel had closed their arguments hereon,

LORD MANSFIELD, chief justice, observed, that, this is a matter of great consequence to trade and commerce; especially, in this country and at this time. This is an inland bill made payable to one man, and indorsed by him to a third man. This third man tenders it for acceptance: And it is refused. He keeps it three weeks without giving any notice of such refusal to accept. He ought to have given notice of this refusal, and not to have concealed it; and by not giving notice, has taken the risque upon himself. The indorser of the bill is imposed upon. The person who neglected to give the notice ought to suffer for it.—The question is not, "whether he was obliged to present it for acceptance." He *has* done so; and it was refused.—There is no difference between an inland bill and a foreign one, in this case. They are both, now, upon the same foot: *Heylin and others against Adamson* in this court [at large in § 1.].

Mr. justice Willes and Mr. justice Ashhurst concurred in opinion with his lordship. They held that the holder of the bill ought to suffer for having neglected to give notice to the person from whom he received it, of the drawee's refusal to accept it. And Mr. justice Ashhurst added that it was understood (upon inquiry) to be the practice of merchants, as well as agreeable to the reason of the thing,

thing, that notice should be given.—Hereon it was ordered that the *Postea* be delivered to the defendants.*

IN the before mentioned case of *Goodall and others* against *Dolley*, Easter 27 Geo. III. was an action by the indorsee of a bill of exchange against the indorser, tried before justice Heath, at the last assizes at Warwick. The bill which was dated on the 4th of November 1786, was drawn by one Lutwych on John Rutter, in favor of the defendant, and payable sixty-five days after date. The defendant indorsed it to the plaintiffs. The bill was tendered for acceptance by the plaintiffs to Rutter on the 8th of November, who refused to accept it. The first advice given of this refusal by the plaintiffs to the defendant was by a letter dated the 6th of January following, which only mentioned generally the return of the bill, without specifying the time or circumstance of the tender of the bill to Rutter, and his refusal. The bill expired on the 11th of January; and on the next day, the defendant made a proposal to one of the plaintiffs to pay the bill by instalments; Justice Heath was of opinion, that as this proposal was made under an ignorance of all the circumstances of the case, which it was material for the defendant to know, he was discharged by the *laches* of the plaintiffs; and, in consequence of the direction, the jury found a verdict for the defendant.

A MOTION was made by Lee, plaintiff's counsel, for a new trial on two grounds. First, that as notice in this case could not have been of any service to the defendant, in as much as Rutter was insolvent when the bill was refused acceptance, it was not necessary to give notice before the bill became

* 5 Burr. Rep. 2670.

due,

due, and the indorser still continued liable. Secondly, supposing he might once have taken advantage of the plaintiffs' laches, yet he had waived that advantage by his subsequent promise.

BALGUY, counsel for the defendant, shewed cause why a new trial should not be granted; and argued that as to the first point it is perfectly clear that the plaintiffs, if they meant to resort to the defendant, should have given immediate notice to him of the bill's being dishonored; instead of which they suffered a long space of time to elapse, by which neglect they have discharged the defendant. As to the other point; the defendant cannot be said to have made himself liable by his subsequent conduct; for if that were so, the same reasoning would have governed the case of *Blesard and Hirst* [the next preceding case], where there was an absolute promise to pay. That therefore was much stronger than the present; for here the party did not absolutely say that he would pay the bill; but under an ignorance of all the circumstances, he proposed to pay it by instalments. This then at most was only a conditional offer, and not being accepted, was the same as if it never had been made.

THE counsel for plaintiffs offered to procure an affidavit, that the drawee had no effects of the drawer in his hands at the time. But as to this, the court were of opinion, that, as between these parties, that would make no difference; and now delivered their separate opinions:

JUSTICE ASHHURST: The case of *Blesard* against *Hirst* goes the whole length of deciding the present. It was there determined, that though it was not necessary that the holder should present the bill

or acceptance before it became due, yet if he does, he must give immediate notice to the person from whom he received the bill in case it is dishonored. Here such notice was not given, and therefore the defendant was discharged. But then it is said that he made himself subsequently liable by his proposal to pay the bill by instalments, which amounted to an acknowledgement of the debt. That argument might as well have been urged in the case of *Blesard v. Hirft* as the present, if it had been thought material. For there the indorser absolutely promised to pay the bill on his return from Leeds; but, on his being apprized that he was not bound by law, he refused. And yet, that was not held as a waiver of the want of notice. That indeed was a stronger case than the present; for here the defendant only made a conditional offer to pay by instalments, which, being rejected, put matters in the same situation as if no offer had been made. The defendant then had a right to stand on the strict rule of law; and by law he is not bound to pay.

JUSTICE BULLER: It is rather extraordinary that in the case of *Blesard v. Hirft* it should have been made a doubt whether notice of non-acceptance in the case of an inland bill of exchange was necessary to be given to the drawer. For it had long been settled, that notice was necessary to be given in the case of foreign bills. But no mention is there made of the want of notice being waived by a subsequent promise. And that was a much stronger case than the present; for there, there was an express promise to pay by the indorser: but in this case there was only a conditional promise, which was made by the defendant under a total ignorance of all the circumstances relative to the bill having been dishonored. All this is an answer to an action against the indorser. But if the action had been brought against the drawer,

drawer, I should have been willing to let in the affidavit to shew that the drawer had no effects in the hands of the drawee. That would be like the case of *Bickerdike v. Bollman* [in our next preceding section]. If A. draw on B. it must be taken *prima facie* that he has effects in his hands; otherwise he has no right to draw on him. But if the drawer has no effects in the hands of the drawee, he cannot be injured by want of notice that the drawer will not pay.

JUSTICE GROSE: If there be any difference between the case of *Bleford v. Hirst* and the present it is in favor of this defendant. For at the most this was only a conditional offer to pay, but there was a positive promise by the defendant to take the bill as he returned from Leeds. That case, therefore, being precisely in point, must govern the present.—Rule discharged, no new trial being granted.

• Durnf. & East. Rep. 712.

C H A P. X.

1. *Of suing the Acceptor of a Bill of Exchange. To whom the Money is to be paid by him, and how he is discharged against Indorsers. What must be proved in an Action against him.*
2. *Of suing the Drawer or Indorser ; and Proof required in an Action against them.*
3. *Who liable to Payment of the Money made payable on a Bill of Exchange. What Satisfaction may be had. Holder of a Bill may sue a subsequent Indorser after taking in Execution a prior. He who accepts for Honor of Drawer liable.*
4. *Resemblance between a Bill of Exchange and Promissory Note, and of suing on the latter.*
5. *The Nature and Effects of Bank Notes. Of presenting and paying such as are payable after Sight.*
6. *Attornies ; their Privilege ; to be proceeded against on Bills of Exchange as in other personal Actions.*

HAVING in our eighth chapter treated of the evidence on a trial by jury, with a view to give the reader a conception of the proof required, and who are and who are not competent witnesses ; and in our ninth on the demand and notice requisite to be made and given previous to suing on a bill or note ; we shall here in our first section treat, On suing the acceptor of a bill of exchange. 2. concerning to whom the money is to be paid by him, and how he is discharged against indorsers. On what must be proved in an action against him. In our second on suing the drawer and indorser. In our third shew who are liable to payment of the money made payable on a bill of exchange ;

change ; how all the parties may be sued thereon and the satisfaction which may be had. In the fourth treat on the resemblance between a bill of exchange and promissory note, and suing the parties on the latter. And hence proceed with the nature and effects of bank notes. Attornies, their privilege, and how they are to be proceeded against and herewith conclude our work.

§ I. 1. PREVIOUS to suing the acceptor, in the first section of our next preceding chapter we have shewn that, no demand is requisite to be made of the drawer ; and in the first section of our third chapter, that a bill payable to a man's order is payable to himself, and he may bring an action averring he made no order ; and in our fourth chapter, the subjects whereof are on acceptances, in the sixth and seventh sections thereof, we have shewn that the acceptor cannot be discharged without an express declaration from the holder, and that if payee receive part from the drawer, acceptor is not discharged thereby ; nor although he suffer several years to elapse before sue the acceptor.

2. As to whom the money is to be paid by the acceptor, and how he is discharged against indorsers. In case the bill be accepted the money is to be paid by the acceptor to him in whose favor the bill is drawn, or to the indorsee, in case it be indorsed over ; and if there are several indorsers and indorsees the last indorsee is entitled to the money. As if A. draw a bill of exchange upon B. payable to C. Then B. accepts the bill. C. indorses it to D. B. is discharged of any payment to C. and if D. indorses it over to E. then B. is discharged of any payment to D. But if D. pays the money to E. then D. by this payment becomes again intitled to receive the money of B. and at such time no other
whether

whether E. or C. is intitled to bring any action against B. but D. only. So if C. pays the money to D. then B. is discharged as to D. but C. becomes really intitled, and B. is again intitled as to him, but discharged against D. and E.* And where A. drew a bill upon B. payable to C. and B. accepted the bill; but afterwards refused to pay it, whereon the bill being indorsed to A. the drawer who brought an action as indorsee. The question was, whether the drawer of a bill could maintain an action as indorsee? By chief justice Parker: There being effects, the acceptance was not upon the honor of the drawer, and so the action is well brought; for when a merchant draws a bill on his correspondent, who accepts, this is payment; for it makes him debtor to another person, who may bring his action; so this is such a payment as may be set off upon a former action: but if there were no effects, the action would not lie; for it would have been an acceptance upon honor only, and the money would be recovered only to be recovered again;* as shewn hereafter at the conclusion of our third section.

3. As concerning what must be proved in an action against the acceptor. In the case of *Mendez against Carreroon*, Mich. 13 W. III. on the evidence at the trial before Holt, chief justice, at Guildhall, the case was thus; A. drew a bill of exchange on B. payable to C. at Paris; B. accepted the bill, C. indorsed it, payable to D. D. to E. E. to F. and F. to G. G. demanded the bill to be paid by B. and on non-payment, G. protested it within the time, &c. and then G. brought an action against D. and it was well brought and he recovered. Afterwards D. brought an action against B. and though D. produced the bill and the protest, yet, because he

* Vin. Abr. tit. Bills of Exchange. (H) 1. * 10 Mod. 37.

could not produce a receipt for the money paid by him to G. on the protest, as the custom is among merchants, as several merchants on their oaths affirmed, he was non-suited: but Holt seemed to be of opinion, that if he had proved payment by him to G. it had been well enough.

THE proof of the acceptance is a sufficient acknowledgment on the part of the acceptor, who must be supposed to know the hand of his correspondent; therefore in an action against the acceptor, the plaintiff shall not be put to prove the hand of the drawer; however proof of the acceptance will not be conclusive evidence against the acceptor, if he can prove the contrary.

IN an action against the acceptor, although the plaintiff shall not be put to prove the drawer's hand, yet the hand-writing of the first indorser must be proved, notwithstanding such indorsement was on the bill at the time it was accepted; as in the case of *Smith against Chester*, Easter, 27 Geo. III. when the action was by an indorsee of a bill of exchange against the acceptor; it appeared at the trial, before justice Buller, at the last sittings at Westminster, that when the bill was accepted there were several indorsements on it. But the plaintiff, not being able to prove the hand-writing of the first indorser, was non-suited.—In this term Bower, plaintiff's counsel, moved the court of King's Bench to set aside this non-suit, on the ground that these indorsements were on the bill at the time of the acceptance, they must be taken to have been admitted by the drawee, and he could not afterwards dispute them; and he cited in support of this a determination of lord Mansfield's in the case of *Pratt against*

* Lord Raym. 742.

c Law of Nisi Patus, 270.

Howe

Rowison, at the sittings after Trin. term. 23 Geo. I. at Guildhall, and another case in *Sayer* 223. observing that there would be great hardship in the use of foreign bills of exchange in many instances, on account of the difficulty and inconvenience of proving the hand-writing of the first indorser, who may be unknown to the holder.

BUT by justice Ashhurst: The law has been heretofore settled. And if it were not so, there would be no difference in this respect between bills payable to order, and those payable to bearer. And it would open a door to great fraud.—Justice Buller: This point was much considered in a late case before this court, when they were perfectly clear that an indorsee of a bill of exchange, in an action against the acceptor, was obliged to prove the hand-writing of the first indorser. For when a bill is presented for acceptance, the acceptor only looks to the hand-writing of the drawer, which he is afterwards precluded from disputing; and it is on that account that an acceptor is liable, even though the bill be forged.—Justice Grose: This matter appears extremely clear; for a bill of exchange is no payment to the person in whose favor it is drawn, until it is indorsed by him.—Hereon the rule moved for was refused.

II. WITH respect to suing the drawer or indorser. In the fourth section of our second chap.

Durnf. and East Rep. 654. bill under a commission of bankruptcy, the hand-writing of the first indorser not being proved; and the question now before his lordship is, Whether the holder of an accepted bill of exchange ought to prove the hand-writing of the first indorser by direct evidence, before he can compel the acceptor to pay it.

ter it is shewn, that, the drawer by his implied contract with the payee is liable to payment of the bill provided the drawee does not pay it, and that by the implied contract the drawer in case acceptance be refused, is liable to an action on the bill although the time of payment is not come. Yet as shewn in the second section of our next chapter preceding this, previous to suing the drawer, notice should be given him of refusal, insolvency or absconding of the drawee, unless the latter had no effects in hand of the former; whereof we have treated in the fourth section of that chapter; and in our fifth chapter on the use and effect of protesting the bill, and in the third section thereof where the protest is to be made; referring from thence to the third section of our ninth chapter; where it may be seen at large that the holder of the bill should not delay giving notice of its being dishonoured, and that he does not intend to give credit. So notice must be given by an indorsee to his indorser, whether it be in case of non-acceptance or non-payment, and if a bill has not been accepted before it became due, and indorsee of such bill present it for acceptance, which is refused; and delay giving notice to his indorser, the latter will be discharged, whether the drawee had effects or not in the drawer in his hands; as shewn at large in the fifth section of our next preceding chapter; and in the fifth section of our fourth chapter we have shewn, that if indorsee accept any part of the money from the acceptor he cannot afterwards resort to the drawer, unless timely notice be given that the bill is not duly paid, which being done the receiving part of the money from an acceptor or indorser, will not discharge the drawer or other indorser.

THAT proof must be of demand made on the acceptor, or of due diligence used to make it

ious to suing the drawer or indorser, we have shewn in the first section of our next preceding chapter, and that indorsee need make no inquiry after the drawer previous to suing the indorser. And in an action against the indorser the plaintiff need not prove the drawer's hand, for if it be a forged bill, yet the indorser is liable, as shewn in the fifth section of our seventh chapter.

BUT in an action against the drawer his hand must be proved. So an indorser's hand is required to be proved in an action against him.—In an action by the indorsee against the drawer, upon *non-assumpsit* the plaintiff proved the drawer's hand, and that when the note with the indorsement was shewn to the indorser, he acknowledged it was his hand-writing, but this was holden not sufficient to charge a third person.*

§ III. HAVING thus taken a view in our two foregoing sections of suing the acceptor, drawer, and indorser; and under the supposition that all of them are liable to pay the bill, the holder whereof having made his demand and given timely notice; we shall now relate what has been mentioned in our second chapter, section the fourth, paragraph seven, that, in case the bill be indorsed, and the indorsee cannot get the drawee to discharge it, he may call upon either the drawer or indorser, or if the bill has been negociated through many hands, upon any of the indorsers; and if the indorser so called upon, has the names of one or more indorsers prior to his own, to each of whom he is properly an indorsee, he may also call upon any of them to make him satisfaction and so upwards.

* Law of Nisi Prius, 273.

BUT though the drawer, acceptor, and indorser, are all liable, yet the party can have but one satisfaction; and until such satisfaction is actually had, he may sue all or any of them; and accordingly it was adjudged in the Exchequer Chamber, where the case was, an indorsee sued the drawer and had judgment against him, and he likewise brought an action against the indorser, to which the indorser pleaded the judgment against the drawer. But the plea was held ill; so that the judgment was not satisfaction without which the party could not be barred of the remedy which he had against the other; and it is said the judgment was reversed, because there was not satisfaction; for the court were of opinion, that the case differs from the case of two trespassers, and is rather to be resembled to two debtors by a joint and several obligation, because by the custom of the first drawer of the bill, and every indorser there is liable to the payment of a sum certain to the indorsee, though the action be to recover by way of damages.—In the case of *Hull* against *Pitfield*, 17 Geo. II. where the drawer of a note was sued by the indorsee, and the bail paid the debt and costs, it was held this absolutely discharged the indorser as much as if the drawer himself had paid it. Concerning interest on a bill of exchange mention is made in our second chapter, section the fourth, paragraph the sixth, and again in the first section of our fourth chapter.

THE holder of a bill of exchange may sue a subsequent indorser, notwithstanding he has ineffectually taken in execution the body of a prior indorser, and afterwards set him at liberty; as in the case of *Hayling* against *Mullball*, Mich. 19 Geo. II.

† 3 New Abr. 607. Lutw.
878. 882.

‡ 1 Wilson's Rep. 48.

where the prothonotary, to whom it was referred to state what was due on a bill of exchange for 23l. 10s. drawn by one Brushby, and payable to Sheridan or order, reported 2l. 19s. 7d. due for interest; and 24l. 6s. 10d. for costs; which with the principal amounted in the whole to 51l. 16s. 3d.

THIS bill was indorsed by Sheridan, and afterwards by one Boon, and came into the hands of Hayling, who sued Boon and took him in execution, and afterwards let him out on a letter of licence, without paying the debt. He then sued Sheridan and held him to bail; and of those bail Mullhall was one. Sheridan not paying the bill, Hayling brought a third action, against Mullhall the bail, who now by Adair his counsel, insisted that the debt was satisfied by the imprisonment of Boon. And Davy, counsel for the plaintiff, having argued on the contrary; the court delivered their separate opinions.

JUSTICE GOULD: I am clearly of opinion with the plaintiff. The holder has a right to sue all the indorsers, till the bill is satisfied. Each indorser is independant of the rest.—Justice Blackstone: Of the same opinion. The law so highly regards the liberty of the subject, that the taking his body in execution by a *Ca. Sa.* [writ of *capias ad satisfaciendum*] is with respect to him, a full satisfaction of the debt. But it only operates as a discharge to the identical person, so imprisoned: It does not discharge even his goods, after his death, by the statute Jas. I. the remedy still remains in force (after his death or discharge) against every other indorser, notwithstanding this ineffective *Ca. Sa.* in like manner as if the plaintiff had sued out an unproductive *Fi. fa.* [writ of *feri facias*] against Boon.—Justice Nares. Of the same opinion. Else two securities

securities would not be better than one.—Hereon (chief justice De Grey being absent) a rule was granted to stay proceedings against the defendant on payment of debt and costs.^b

FROM hence it appears how the drawer, drawee, and indorser, of the bill are all liable to payment thereof. So he who accepts for honor of the drawer, treated of in the latter part of the eleventh section of our fourth chapter, is subject to the payment; and by such acceptance the person to whom the bill is payable hath his remedy both against such person as surety, and also against the principal; but the principal or original drawer is liable to him who thus subscribes for his honor.^a Who may recover back the amount of the bill from the drawer in an action for money paid, laid out and expended.^c

§ IV. THE resemblance between a bill of exchange and promissory note, we hinted in our second chapter, section the fourth, paragraph eighth, was, that the latter resembled the former when indorsed over, and that the law considered a promissory note in the light of a bill drawn by a man upon himself and accepted at the time of drawing. And in our third chapter, section the seventh, we mentioned that the resemblance between a bill of exchange and promissory note begins when it is indorsed; for then it is an order to pay the money to the indorsee; and therefore the indorsee before he brings an action against the indorser of a promissory note, ought to demand the money of the drawer, which demand so made or due diligence used to make it, must be proved in an action against the indorser as mentioned towards the conclusion of the

^b 2 Black. Rep. 1235.

^c 3 New Abr. 608.

^a 3 New Abr. 608. Durnf. & East Rep. 269.

first section in our next preceding chapter; and in the third section thereof the time wherein notice should be given of a note being dishonoured. But in the sixth section of our third chapter we mentioned that, there is a distinction between a note payable to B. or order, and to B. or bearer; in the first case, in an action against the indorser, the plaintiff must prove a demand on the drawer; but not in the last, for there the indorser is in nature of an original drawer. In the first case, if the indorsee give credit to the drawer, without notice to the indorser it will discharge him: So receiving part of the money from the drawer will for ever discharge the indorser; for by such receipt the indorsee has made his election to have his money from the drawer. And where it was proved that the indorser had paid part of the money, this was held sufficient to dispense with the necessity of proving a demand on the drawer.

HENCE it may be perceived that, pursuant to those restrictions, when a promissory note is indorsed over, every indorser as well as the drawer is liable to payment thereof; and that in case of non-payment by the drawer, the several indorsees of the note have the same remedy as upon bills of exchange against the prior indorsers; and may recover principal and interest: concerning the latter mention is made in the seventh section of our third chapter.

§ V. THE nature of bank notes is different from that of bills of exchange and notes ordained by statute 3 & 4 Ann. as hinted in the first paragraph of the fourth section of our second chapter; and in the case of *Miller against Race*, King's Bench, Hil. 31 Geo. II. the nature and effects hereof are described. In this case an action of trover was brought against

against the defendant, on a bank note, for the payment of 2*l.* 10*s.* to one William Fenny, or bearer on demand. The cause was tried before lord Mansfield, at the sittings at Guildhall, London; and upon the trial it appeared that William Fenny being possessed of this bank note, on the 11th of December 1756, sent it by the general post, under cover; that on the same night the mail was robbed, and the bank note in question (amongst other notes) taken and carried away by the robber; that this bank note on the 12th of the same December, came into the hands and possession of the plaintiff, for a full and valuable consideration, and in the usual way of his business, and without any notice or knowledge of its being taken out of the mail.—It appeared that Mr. Fenny having notice of this robbery, on the 13th of December, applied to the bank of England to stop the payment of this note; which was ordered accordingly, upon Mr. Fenny's entering proper security to indemnify the bank.—Some little time after this the plaintiff applied to the bank for payment of this note; and, for that purpose, delivered the note to the defendant, who is clerk in the bank: But the defendant refused either to pay the note, or to deliver it to the plaintiff. Upon which this action was brought against the defendant.—The jury found a verdict for the plaintiff, and the sum of 2*l.* 10*s.* damages; subject nevertheless to the opinion of the court upon this question, *viz.* Whether, under the circumstances of this case, the plaintiff had a sufficient property in this bank note, to intitle him to recover in the present action.

THIS being argued by counsel on each side, lord Mansfield fully discussed the nature and effects of bank notes; and in delivering the resolution of the court. By his lordship: "Bank notes are considered

as money, as cash in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes. They are as much money as guineas themselves are; or any other current coin, that is used in common payments as money or cash. They pass by a will, which bequeaths all the testator's money or cash; and are never considered as securities for money, but as money itself. In case of money stolen, the true owner cannot recover it, after it has been paid away fairly and honestly upon a valuable and bona fide consideration: but before money has passed in currency an action may be brought for the money itself. An action may be against the finder of a bank note; but not after it has been paid away in currency.—Here is no pretence or suspicion of collusion with the robber.”—The whole court being unanimous, ordered the *Posse* to be delivered to the plaintiff.

BANK NOTES payable after sight, are to be presented at the bank, whereon the day of being presented is marked; and on the day next ensuing, the time of their running commences, and at the expiration thereof the same are to be paid, no day of grace being required.

§ VI. ATTORNIES (being officers of the court herein admitted and always supposed to be there attending) are not liable to be arrested by the ordinary process of the court, but must be sued by bill (called usually a bill of privilege) as being personally present in court. And if an attorney is sued *original* as acceptor of a bill of exchange, he may plead his privilege in abatement in such case as well

as in any other personal action; a demonstration whereof we shall have in the following case; and towards the conclusion of this section some hint will be dropt concerning this bill of privilege, the method of proceeding therewith, and of an attorney's writ of privilege.

IN the case of *Comerford* against *Price*, in King Bench, Hil. 20 Geo. III. where the action was original, against the defendant, as acceptor of a bill of exchange.—The declaration set forth, that the drawer had directed the bill of exchange to the defendant, by the name and description of *William Price, Attorney at law*.—The defendant pleaded, in abatement, that at the time of suing out the original he was an attorney of this court, and that, according to the immemorial custom and privileges of the court, every attorney of the court who is sued in any personal action, ought to be sued by *bill*, filed and exhibited against him as being present in court, and that no attorney is compellable against his will to answer in any personal action prosecuted by original; and averred, that he had been impleaded by the said original writ against his will, and against the custom and privilege aforesaid.—The plaintiff demurred generally.

DAVENPORT, plaintiff's counsel, argued that, if this privilege of attorneys were to be held to extend to actions on bills of exchange, it would be productive of great inconvenience to trade, for a bill could not be filed in the vacation, and if the bill of exchange became due in the vacation, which was the case here, an attorney, who was an acceptor or indorser, might set the holder at defiance for several months, so that the security would be worse than in the case of other persons, and not what the holder is intitled to by the custom of merchants. By accepti

pting the bill, the defendant ought to be considered as having waived his privilege. When an attorney assumes a new character, as by taking upon him the office of executor or administrator, or by joining with another person in any contract he loses his privilege, whether he is plaintiff or defendant. Here, by signing the bill of exchange, the defendant had taken upon him, in the eye of the law, the character of a merchant. He said there were no issues on the subject.

BOWER, counsel for the defendant, was to have argued in support of the plea, but lord Mansfield stopped him.—By his lordship: This case is extremely clear. A man does not make himself a merchant by drawing or accepting a bill of exchange. Here the very bill of exchange itself described the defendant as an attorney. If there be no issue it is because the privilege cannot admit of a doubt.

JUSTICE BULLER: It must not be taken for granted that a bill cannot be filed in vacation. I think there has been a case before the court, since I have been on the bench, where it was determined, that it may be done to save the statute of limitations. As to the inconvenience supposed to attend this privilege in the case of bills of exchange, I do not see that there is any. Every person who takes one ought to make it his business to inquire into the situation and circumstances of those whose names are on it. And with regard to the advantage of the plea, that was originally only meant to compel an appearance, nothing farther can be done in the vacation; so that by filing your bill against an attorney the first day of term, you are so far advanced in the

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the cause as if he had been arrested.—Hereof
ment was for the defendant.*

In the case of *Lane* against *Wheat*, in 1
Bench, 23 Geo. III. it was held that a bill
filed against an attorney in the vacation.*—Att
are not to be arrested at the commencement
suit, but the manner of proceeding is by
bill against them, as before hinted. This
nearly like a declaration against any other
and the proceedings thereon very nearly the
as the proceedings against others, and if judgment
is hereby obtained the attorney may be in
custody and imprisoned; but if he is arrested
commencement of the suit, the action will
afide by his pleading in abatement as before
monstrated.—If an attorney is arrested in a
court, he cannot have his writ of privilege
must plead it in abatement, but if he is arrested
an inferior court, he may have his writ and
charged.*

* Doug. Rep. 312. 2 Edit.

* 2 Black- Rep. 101

* *Ibid*, 314.

FINIS